No. 79-4

In the Supreme Court of the United States

OCTOBER TERM, 1979

JASPER F. WILLIAMS, M.D., AND EUGENE F. DIAMOND, M.D.,

Appellants,

vs.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own behalf and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation, and JANE DOE, on her own behalf and on behalf of all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF INTERVENING DEFENDANTS-APPELLANTS

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BRIEF
Of Intervening Defendants-Appellants
Jasper F. Williams, M.D. and Eugene F. Diamond, M.D.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division is reported at 469 F.Supp. 1212 (N.D. Ill. 1979).

The opinion of United States Court of Appeals for the Seventh Circuit is reported at 596 F.2d 196 (7th Cir. 1979).

JURISDICTION

This is a civil proceeding to which the United States is a party and in which, *inter alia*, an Act of Congress, the Department of Health, Education, and Welfare Appropriations Act of 1977, Pub. L. No. 95-480, §210, 92 Stat. 1586 (1978) (hereinafter the "Hyde Amendment"), has been held unconstitutional. The final judgment of the district court was entered on April 30, 1979. Notice of Appeal to this Court was duly filed by the Intervening Defendants-Appellants Jasper F. Williams, M.D. and Eugene F. Diamond, M.D. (hereinafter "intervenors") in the United States District Court for the Northern District of Illinois, Eastern Division on May 2, 1979, and is set forth in the Appendix. A. 146.

The jurisdiction of this Court to hear this appeal rests on 28 U.S.C. §1252 (1976), which confers jurisdiction upon this Court to review by direct appeal the decision of a district court holding an Act of Congress unconstitutional in any civil action to which the United States is a party. Prior to the entry of final judgment in the district court, the United States intervened and participated in this litigation at the trial level. The following cases sustain the jurisdiction of this Court to review the judgment below on direct appeal from the district court: *McLucas* v. *De Champlain,* 421 U.S. 21 (1975); *United States* v. *Raines,* 362 U.S. 17 (1960); *Fleming* v. *Rhodes,* 331 U.S. 100 (1946); *International Ladies' Garment Workers' Union* v. *Donnelley Garment Co.,* 304 U.S. 243 (1938).

In their Motion to Vacate in Part, to Dismiss in Part, and to Affirm, the Plaintiffs-Appellees (hereinafter "plaintiffs") argued that this Court has no jurisdiction because

they did not challenge the federal statute, the Hyde Amendment, in their pleadings. In support of their position, plaintiffs cited *United States* v. *Raines,* 362 U.S. 17, 21 (1960), a case in which this Court indicated that it "will never . . . anticipate a question of constitutional law in advance of the necessity of deciding it." A brief look at the procedural history of this case will reveal to this Court not only its jurisdiction over this case, but also must undertake the "necessity of deciding" it.

Plaintiffs challenged, on constitutional as well as federal statutory grounds, the validity of an Illinois law, restricting public funding of abortion [Act of June 27, 1977, P.A. 80-1091, 1977 Ill. Laws; at ILL. REV. STAT. ch. 23, §§5-5, 6-1, 7-1 (1979) (hereinafter cited as "P.A. 80-1091")]. P.A. 80-1091 was modeled after the original Hyde Amendment enacted by Congress in 1976.[1]

The United States District Court for the Northern District of Illinois invalidated P.A. 80-1091 on the theory that it conflicted with the federal Medicaid Act, Title XIX of the Social Security Act, 79 Stat. 343, as amended, 42 U.S.C. 1396 *et seq.,* (1976) (hereinafter referred to as "Title XIX") which the court interpreted to require the States participating in the medicaid program to fund all procedures which a physician deems "medically necessary."

On appeal, the United States Court of Appeals for the Seventh Circuit reversed the district court, finding that the Hyde Amendment had substantively amended Title XIX. Therefore, it ruled Illinois was not required by Title XIX to fund abortions other than those covered by the Hyde Amendment. *Zbaraz* v. *Quern,* 596 F.2d 196, 202 (7th Cir. 1979). The Hyde Amendment thus became a central factor in this case. The Seventh Circuit remanded the case

[1] The Department of Health, Education, and Welfare Appropriations Act of 1976, Pub. L. No. 94-439, 209, 90 Stat. 1418 (1976).

to the district court with instructions to resolve the constitutionality of the Hyde Amendment and P.A. 80-1091, and directed that the district court's

> consideration should include, *inter alia,* whether the Hyde Amendment, by limiting funding for abortions to certain circumstances even if such abortions are medically necessary, violates the Fifth Amendment in view of the fact that no other category of medically necessary care is subject to such constraints and that abortion has been recognized as a fundamental right.

Zbaraz v. *Quern,* 596 F.2d at 202.

Thus, it was appropriate and necessary for the district court to rule on the Hyde Amendment, and this Court clearly has jurisdiction to determine the constitutionality of this Act of Congress. In *McLucas* v. *De Champlain,* 421 U.S. 21 (1975), this Court noted:

> [t]he language of the statute [§1252] sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality. The purpose of §1252 is too plain to allow circumvention, whatever doubts may be entertained about the wisdom of mandatory direct review in other circumstances. Our previous cases have recognized that this Court's jurisdiction under §1252 in no way depends on whether the district court had jurisdiction.

Id. at 31.

In *United States* v. *Raines,* 362 U.S. 17 (1960), this Court found that it had jurisdiction "since the basis of the decision below in fact was that the Act of Congress was unconstitutional, no matter what the contentions of the parties might be as to what its proper basis should have been." *Id.* at 20.

An appeal taken under §1252 brings the "whole case" before this Court, and thus the question of the constitutionality of P.A. 80-1091 comes properly before it. *McLucas* v. *De Champlain,* 421 U.S. 21 (1975); *United States* v. *Raines,* 362 U.S. 17 (1960).

This Court's jurisdiction over the "whole case" also allows review of the question of whether the State of Illinois is permitted to fund only those abortions necessary to preserve the life of the mother under Title XIX of the Social Security Act. The Seventh Circuit in *Zbaraz* v. *Quern,* 596 F.2d 196 (7th Cir. 1979), held that Title XIX had been amended by the Hyde Amendment and thus, that Title XIX allowed states to have restrictive abortion funding policies, but only to the extent the Hyde Amendment provides they may. Although this *Zbaraz* appeal to the Seventh Circuit was from a final order entered in the district court, the Seventh Circuit's reversal and remand back to the district court resulted in the Seventh Circuit's appellate proceedings becoming interlocutory in nature. *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostook R. Co.,* 389 U.S. 327, 328 (1967). See also *American Const. Co.* v. *Jacksonville, T. & K.W.R. Co.,* 148 U.S. 372, 384 (1893). A party is not required to petition for *certiorari* to review an interlocutory order of a court of appeals, and the fact that a petition was not made will not prejudice that party's rights on later appeal after final judgment. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.,* 240 U.S. 251 (1916); *City of Indianapolis* v. *Chase Nat. Bank,* 314 U.S. 63 (1941); *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399 (1923).

In sum, this Court has jurisdiction to review directly from the district court the decision of that court invalidating the Hyde Amendment on constitutional grounds, as well as all ancillary issues in this case.

The Statutes Involved

The Hyde Amendment

Department of Health, Education, and Welfare Appropriations Act of 1979, Publ. L. No. 95-480, §210, 92 Stat. 1586 (1978):

> None of the funds contained in this act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-standing physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

The Hyde Amendment was extended in a Further Continuing Appropriation for 1980 signed into law by President Carter on November 20, 1970, as Joint Resolution (H.J. Res. 440) Pub. L. No. 96-123, 93 Stat. 923, 926 (1979).

> Notwithstanding any other provision of this Joint Resolution except section 102, none of the funds provided by this Joint Resolution shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.

The Illinois Law

Act of June 27, 1977, P.A. 80-1091, 1977 Ill. Laws (Codified at ILL. REV. STAT. ch. 23, §§5-5, 6-1, 7-1) (1979):

> Sec. 5-5. The Illinois Department, by rule, shall determine the quantity and quality of the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following: . . . but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.
>
> Section 6-1. Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.
>
> Section 7-1. Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care, . . . except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child.

QUESTIONS PRESENTED

I. Whether the United States Congress acting under the Appropriation Power granted solely to it under Article I, section 9, clause 7 of the United States Constitution violates the Fifth Amendment to the Constitution by enacting the Hyde Amendment which limits the disbursement of federal funds for abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians?

II. Whether Congress acting under the legislative powers granted to it by the United States Constitution may protect its interests, particularly its strong interest in fetal life, by limiting, through enactment of the Hyde Amendment, disbursement of federal funds for abortions?

III. Whether the General Assembly of the State of Illinois may protect the interests of the state, particularly the state's strong interest in fetal life, by enacting Public Act 80-1091 which limits the disbursement of public funds for abortions to those abortions necessary to preserve the life of the mother?

IV. Whether the State of Illinois is permitted under Title XIX (the Medicaid Title) of the Social Security Act to fund only those abortions necessary to preserve the life of the mother?

STATEMENT OF THE CASE

On June 27, 1977, the Illinois General Assembly passed Public Act 80-1091 to amend §§5-5, 6-1, and 7-1 of the Illinois Public Aid Code, which was originally approved April 11, 1967. P.A. 80-1091 was vetoed September 13, 1977, but became law on November 17, 1977, upon a vote by three-fifths of the legislature to override the gubernatorial veto. It provided that public funds would not be expended for abortions unless the abortions were necessary to preserve maternal life.

On December 6, 1977, plaintiffs filed a class action suit in the United States District Court for the Northern District of Illinois, Eastern Division, to enjoin enforcement of the statute, claiming jurisdiction under 28 U.S.C. §§1331, 1343(3) and (4) (1976), and seeking relief under 42 U.S.C. §1983 (1976), 28 U.S.C. §2201 (1976), and Fed.R.Civ.P. 57. They alleged that P.A. 80-1091 violated their rights under Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.* (1976), the Ninth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. In their complaint plaintiffs alleged that P.A. 80-1091 "prohibits state public assistance payments for medically necessary abortions for women otherwise eligible for medical assistance because of their indigency and, at the same time Illinois provides public assistance payments for all other types of medically necessary services to these women and all other eligible indigent persons." Accordingly, they filed a motion for a temporary restraining order or preliminary injunction.

The plaintiffs are David Zbaraz, M.D., and Martin Motew, M.D., physicians whose business includes performing abortions upon medicaid recipients; the Chicago Welfare Rights Organization, which purports to represent the interests of

medicaid recipients who desire to receive governmentally financed abortions whenever a physician considers them to be medically necessary but not necessary to preserve their lives, and who would not receive state funding for such abortions under P.A. 80-1091; and Jane Doe, a member of the same class.

Jane Doe was alleged to be a recipient of Aid to Families with Dependent Children ("AFDC") public assistance, 42 U.S.C. §§601 *et seq.* (1976), and medical assistance under the Medicaid Title, 42 U.S.C. §1396 *et seq.* (1976). Plaintiff Doe was described as a 38 year old woman who had had nine previous pregnancies, was pregnant again, and desired to have an abortion. Accompanying the motion was the Affidavit of David Zbaraz, M.D., which stated that he had reviewed the medical records of Jane Doe who had recently been examined by two other physicians on the staff of Michael Reese Hospital in Chicago, Illinois. Those records disclosed that Jane Doe had a history of varicose veins and thrombophlebitis (blood clots) of the left leg. In Dr. Zbaraz's professional opinion, on the basis of the medical records he reviewed, Jane Doe's varicose veins would recur if her pregnancy were to continue and there existed a 30% risk that the thrombophlebitis would recur necessitating hospitalization and bed rest if the fetus were carried to term. Dr. Zbaraz concluded that an abortion was medically necessary for Jane Doe, though not necessary to preserve her life.

The Defendant-Appellants (hereinafter "defendants") are Jeffrey C. Miller, Acting Director of the Illinois Department of Public Aid, the state agency charged with administering the medical assistance programs and with enforcement of the Illinois statute in question; Jasper F. Williams, M.D., an obstetrician, a physician-taxpayer, and former President of the National Medical Association who on a regular and recurring basis treats women who carry their

pregnancies to term, and Eugene F. Diamond, M.D., a physician-taxpayer, a practicing pediatrician, and Professor of Pediatrics. Drs. Williams and Diamond intervened in their capacity as physician-taxpayers who support the state policy articulated by P.A. 80-1091, who conscientiously object to abortion and participation in abortion through use of their taxes in violation of the Hippocratic Oath, and whose economic interests are at stake since the outcome of this litigation may result in a loss of patients, both mothers and the children they carry. The United States intervened as a party defendant when the Hyde Amendment, an Act of Congress, was brought into issue.

During the course of proceedings in the district court, affidavits and supporting materials were submitted by both sides in support of counter motions for preliminary relief and summary judgment. The affidavits of the plaintiffs were submitted in support of the statement in their complaint that public assistance is not provided for medically necessary abortions for women otherwise eligible for medical assistance because of their indigency, while payments are provided for all other types of medically necessary services for these women. In their affidavits, plaintiffs cited several medical conditions or diseases for which their affiants would certify abortion is medically necessary or medically indicated. A. 32, 33. Plaintiffs' affiants also indicated that predictions about a pregnant woman's health condition only rarely can be made with certainty. A. at 114, 128. They indicated that "in (their) professional opinion, the effect of the new Illinois criteria for abortion coverage under the medical assistance program will be to increase substantially maternal morbidity and mortality among indigent pregnant women." A. at 111.

Intervening defendants submitted the affidavit of Jasper F. Williams, M.D., which indicated that for "each and every

medical condition for which Dr. Depp (A. at 28) indicates pregnancy creates or exacerbates a threat to maternal health or life, alternative medical treatments other than abortion exist for which the physician might be reimbursed through Medicaid." A. at 99. Intervening defendants also submitted the Department of Health, Education, and Welfare, Center for Disease Control, 28 *Morbidity and Mortality Weekly Reports* 4 (Feb. 2, 1979), which reported on the Department of Health, Education, and Welfare's hospital surveillance project on the effect of abortion funding restrictions in 13 states and the District of Columbia. The Report indicates that "[n]o increase in abortion-related complications was observed in this surveillance project . . . No abortion deaths related to either illegal or legal abortions were detected through the hospital surveillance. There was also no significant difference between institutions in funded and non-funded states in the proportion of Medicaid women with abortion complications over the eight month period (of the study)." A. at 138-139. In spite of this conflicting evidence, no evidentiary hearing was held.

On December 21, 1977, the District Court issued an unreported Memorandum Opinion and Order denying the plaintiffs' motions for a temporary restraining order or preliminary injunction and abstained pending state court adjudication. On December 22, 1977, plaintiffs appealed to the Seventh Circuit Court of Appeals.

On January 11, 1978, the Seventh Circuit Court of Appeals granted plaintiffs' motion for injunction pending appeal. On March 15, 1978, the Circuit Court reversed the opinion of the District Court on the abstention issue, vacated the injunction pending appeal and remanded the case to the district court. *Zbaraz* v. *Quern,* 572 F.2d 582 (7th Cir. 1978).

On May 15, 1978, the district court issued an unreported Memorandum Opinion and Order denying defendant Quern's motions to dismiss for want of jurisdiction and for summary judgment, and granted plaintiffs' motion for summary judgment after finding that the Illinois statute was in conflict with the objectives of Title XIX of the Social Security Act.

On May 23, 1978, both defendant Quern and intervening defendants Diamond and Williams moved in the district court for a stay pending appeal which was denied on that date. On May 23, the plaintiffs moved in the district court for entry of Final Judgment and Order. On May 24, 1978, defendant Quern filed a notice of appeal in the district court and the next day moved in the Circuit Court for a stay pending appeal. On May 30, intervening defendants filed a notice of appeal and applied to the Circuit Court for a stay pending appeal.

On June 13, 1978, the district court entered an amended Final Judgment and Order. On June 15, 1978, the Court of Appeals denied the defendants' motions for stay pending appeal.

On June 23, 1978, intervening defendants applied for a stay pending appeal to United States Supreme Court Justice John Paul Stevens who denied it on June 27. On June 29, the same application was made to Chief Justice Warren Burger who denied it on July 5. On July 13, 1978, the intervening defendants and defendant Quern separately filed notices of appeal from the district court's amended Final Judgment and Order.

On February 13, 1979, the United States Court of Appeals for the Seventh Circuit reversed the District Court's decision. In a Memorandum Opinion, the court stated that the district court was correct in finding that the Illinois statute was in conflict with the objectives of Title XIX of

the Social Security Act, but held that the Hyde Amendment was itself a substantive amendment to the Social Security Act and not simply a limitation on the use of funds for abortion. *Zbaraz* v. *Quern,* 596 F.2d 196 at 201, 202 (1979). The Court held that Illinois was thus not required by Title XIX to fund abortions other than those covered by the Hyde Amendments. The Seventh Circuit remanded the case to the district court with instructions to consider the constitutionality of both the Illinois statute and the Hyde Amendment. The district court was also ordered to modify its injunction to allow for payments for those abortions fundable under the Hyde Amendment.

Pursuant to the mandate of the Seventh Circuit, the district court by Order dated February 15, 1979, modified its permanent injunction entered on May 15, 1978, to require Illinois to fund all Hyde Amendment abortions in its enforcement of P.A. 80-1091, thereby expanding eligibility for abortion funding to cover rape and incest victims and those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Since the constitutionality of a federal statute had been drawn into question, the district court so informed the Attorney General of the United States pursuant to 28 U.S.C. § 2403(a) (1976), Order of February 22, 1979, and directed the Attorney General to notify the court whether the United States intended to seek permission to intervene for presentation of evidence and for argument on the question of the Hyde Amendment's constitutionality.

Intervention was granted the United States by an Order of March 8, 1979. Thereafter, each party submitted to the Court a motion for summary judgment supported by briefs, affidavits, and exhibits addressing the constitutional issues.

In a Memorandum Opinion dated April 29, 1979 the district court held that the Hyde Amendment and P.A. 80-1091 (as modified by court order) were unconstitutional as violative of the plaintiffs' right to equal protection of the laws. *Zbaraz* v. *Quern,* 469 F.Supp. 1212 (N.D. Ill. 1979). Finding that this Court's decision in *Maher* v. *Roe,* 432 U.S. 464 (1977) precluded any claim of a fundamental right to a state-funded abortion, or that a state's refusal to fund abortions amounted to an unconstitutional penalty, the Court declined to apply strict judicial scrutiny to either statute and instead sought to determine if there were any legitimate state interests which were rationally related to the legislative classification at issue.

The district court found that the effect of the Hyde Amendment and P.A. 80-1091 "will be to increase substantially maternal morbidity and mortality among indigent women." *Zbaraz* v. *Quern,* 469 F.Supp. at 1220. The court held:

> a pregnant woman's interest in her health so outweighs any possible state interest in the life of a nonviable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate. At the point of viability, however, "the relative weights of the respective interests involved" shift, thereby legitimizing the state's interest. After that point, therefore, we believe a state may withhold funding for medically necessary abortions that are not life-preserving, even thought it funds all other medically necessary operations.

Id. at 1221.

In its Memorandum Opinion of April 29, 1979, and in its Final Judgment, Order and Injunction of April 30, 1979, the district court, by Judge John T. Grady, held that both the Hyde Amendment and P.A. 80-1091 were unconstitutional as applied to medically necessary abortions prior to the point of fetal viability.

Motions for Stay of the District Court's Final Judgment, Order and Injunction of April 30, 1979, were denied by the District Court on April 30, 1979. Notice of Appeal to this Court was filed by the intervening defendants on May 2, 1979, and is set forth in the Appendix at 146. On the same day the intervening defendants filed an Application for Stay Pending Appeal of the mandate of the United States District Court for the Northern District of Illinois, Eastern Division. The stay was denied by Mr. Justice Stevens on May 24, 1979. *Williams* v. *Zbaraz*, ... U.S. ....., 99 S.Ct. 2095 (1979). A subsequent application for stay was made to Mr. Justice Rehnquist on May 24. It was referred to the full Court denied on June 4, 1979.

This appeal is taken by intervening defendants Williams and Diamond with respect to both the Final Judgment and Order of the United States Court of Appeals for the Seventh Circuit entered February 13, 1979, in *Zbaraz* v. *Quern*, 596 F.2d 196 (7th Cir. 1979), and the Final Judgment, Order and Injunction of the United States District Court for the Northern District of Illinois, Eastern Division, entered April 30, 1979, in *Zbaraz* v. *Quern*, 469 F.Supp. 1212 (ND. Ill. 1979).

SUMMARY OF ARGUMENT

This is a case about the appropriation and the disbursement of public funds under federal and state medicaid programs. It is not a right to privacy case.

The primary issue is whether Congress and the State of Illinois may set the standard for the disbursement of public funding for abortion.

There is no undue burden on the right to privacy involved. Thus, this case is far different than the right to privacy cases involving abortion such as *Roe* v. *Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Central Missouri* v. *Danforth*, 423 U.S. 52 (1975), *Bellotti* v. *Baird*, ... U.S. ....., 99 S. Ct. 3035 (1979), and *Collautti* v. *Franklin*, ... U.S. ....., 99 S. Ct. 675 (1979). Those cases concerned criminal statutes which punished the decision to abort. This case involves the expenditure of public funds.

Maher v. *Roe*, 432 U.S. 464 (1977), and *Poelker* v. *Doe*, 432 U.S. 519 (1977), have resolved all the significant constitutional issues involved in this case. In those cases, it was held that there is no due process right to public funding for abortion or for public funding for any health related procedure. *Maher* v. *Roe*, 432 U.S. at 474. The lower court here attempted to distinguish this case from *Maher* and *Poelker* on the theory that here the woman has a "medical need" for an abortion, whereas in *Maher* and *Poelker* the abortion sought was "purely elective." A careful study of *Maher* and *Poelker*, however, reveal that this Court did not use the term "nontherapeutic" abortion to mean "purely elective," non-health related abortion as was assumed by the lower court. Rather, the term was used in a much broader sense. Consequently, *Maher* and *Poelker* have resolved the constitutional question of public funding of the so-called health abortion as well.

Should this Court conclude, contrary to the language and reasoning of *Maher* and *Poelker*, that the issue of the public funding under federal and state welfare programs for abortions which physicians deem "medically necessary" has not been resolved, then this case must be resolved on the basis of more general constitutional principles. Under established constitutional principles applied in public welfare cases generally, including in *Maher* and *Poelker*, the decision of the lower court holding the Hyde Amendment and P.A. 80-1091 unconstitutional must be reversed.

The United States Constitution vests the legislative branch of government with the power to spend and appropriate public resources. All federal welfare programs have been created by virtue of these constitutional powers. The principles of nonjusticiability are set forth in the "political question" cases, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186 (1962). If those principles do not counsel nonjusticiability, they most certainly counsel prudence and the exercise of restraint by this Court in this case. Accordingly, if this Court should decide to review these congressional and state budgetary decisions, it should subject those decisions to a "low level" judicial scrutiny and defer to congressional and legislative judgment.

The abortion funding restrictions of the Hyde Amendment and P.A. 80-1091 do not involve or impinge upon fundamental due process rights, such as the right to privacy. Privacy, by its very nature, implies a zone of non-state involvement—a right to non-interference by the State. Public funding is public involvement.

There is also no constitutional obligation to fund *any* medical expenses of indigents. *Maher* v. *Roe*, 432 U.S. 464 (1977); *Poelker* v. *Doe*, 432 U.S. 519 (1977); *Dandridge* v. *Williams*, 397 U.S. 471 (1970). This principle is not

altered by the conclusion of a physician that an abortion is "medically necessary."

"Equal protection" is not violated by the manner in which the federal government and the State of Illinois disburse public funds under the Hyde Amendment and P.A. 80-1091. *Maher* v. *Roe*, 432 U.S. 464 (1977). The laws before this Court must be upheld in accord with the standards set forth in *San Antonio School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973): 1) the state interests promoted by these statutory schemes are legitimate; 2) these statutory schemes rationally further the legitimate state interests; 3)the statutory schemes do not impinge upon fundamental rights or involve a suspect class.

Based on the legislative history of these abortion funding restrictions, at least four interests of state are involved: protection of prenatal human life, promotion of normal childbirth, recognition of moral values of the American people, and promotion of the fiscal and demographic interests of State. Each of these interests is important and legitimate.

"Legitimacy of a state interest" refers to whether the State, under the Constitution, may even pursue, protect, or promote the interest. For example, the State may not discourage the exercise of the fundamental right to interstate travel. *Shapiro* v. *Thompson*, 394 U.S. 618 (1968). Thus, if the result of a statute were to block the immigration of citizens from one state to another, the statute would be invalid because stopping interstate travel is not a legitimate end of state. If a state interest is legitimate, it does not cease to be legitimate because, in the opinion of a court, a different legitimate state interest ought to have been pro-

moted with limited resources. The question concerning which of various legitimate interests the State should pursue is for the legislature to determine. Nonetheless, the lower court concluded that the state's important and legitimate interests in prenatal human life lost its legitimacy because the Congress and the State of Illinois ought to have promoted another state interest, *i.e.*, the "health" of pregnant women. Thus, under the guise of ruling on "legitimacy" the lower court performed a function reserved to the legislature; it "second-guessed" congressional and state legislative decisions on how to allocate public funds in clear violation of the principles of *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

The abortion funding restrictions rationally further these legitimate interests of state, and do not involve classifications which are irrational. The reasonableness of the classifications of any statutory scheme can only be determined by considering the end of the state interest promoted by the statute. Here, the decision not to fund abortion unless necessary to save the life of the mother and to fund prenatal care and childbirth is rational and necessary to promote and protect the legitimate state interests involved. From the perspective of these interests, the classifications involved are entirely rational.

From the perspective of federal and state medicaid programs, the classifications are also rational and constitutional, since there are a number of reasons why abortion as a medical procedure is very different from other medical procedures, including prenatal care and childbirth, which

are funded under medicaid. Some of those reasons are that abortion involves the termination of fetal life, that abortion is repugnant to the moral values of a political majority of American and Illinois taxpayers who must now fund abortion, and that abortion may be incompatible with the State's demographic and fiscal interests. Even standing alone each of these important interests establish a reasonable basis for treating abortion differently than other medical procedures and treatment in the medicaid funding scheme.

Since the abortion funding restrictions do not impinge upon fundamental rights, do not penalize the exercise of fundamental rights, and do not discriminate against a suspect class, strict scrutiny does not apply.

If this Court, contrary to precedent (see, *e.g.*, *Helvering* v. *Davis*, 301 U.S. 619 [1937]; *Dandridge* v. *Williams*, 397 U.S. 471 [1970]), should assume the authority to pass judgment on the wisdom of the ordering of budgetary priorities set by Congress and the State of Illinois, this Court should consider whether the abortion funding restrictions significantly increase health risks to pregnant women. The medical literature documents the existence of safe and effective alternative forms of treatment for the medical problems suggested by the lower court in support of its conclusion that the abortion funding restrictions are "cruel." A study by the Center of Disease Control establishes no significant increase in morbidity and mortality of pregnant women in those areas in which abortion funding restrictions have been in effect. Nonetheless, ignoring the existence of alternative treatment and in spite of evidence

to the contrary, the district court held that increased medical risks are involved.

The standard of "medical necessity" or "medically indicated" used for funding some other medical procedures under medicaid is not appropriate for the funding of abortion because of the existence of non-medical reasons for abortion and the tendency of the term "medical necessity" to be very loose and, thus, subject to abuse. In effect, the use of the "medical necessity" standard for public funding of abortions will result in the public funding of elective abortion and the unnecessary destruction of other competing important and legitimate interests of state. The Hyde Amendment and P.A. 80-1091 represent a most responsible and wise compromise designed to maximize, to the extent possible, all of the various state interests involved in a decision to abort.

The Seventh Circuit Court of Appeals in its ruling on the compatibility of P.A. 80-1091 with federal statutory requirements of the Medicaid Title stated that without substantive changes in medicaid effected by the Hyde Amendment, the State of Illinois must fund all "medically necessary" abortions, then held that P.A. 80-1091 was invalid to the extent that it did not provide the coverage to the extent of the Hyde Amendment. This holding and statement of law concerning state obligations under the medicaid program is wrong and inconsistent with the legislative history of medicaid, the express statements of members of Congress, and the language of Title XIX and its implementing regulations. The State of Illinois is permitted to make such adjustments in medicaid coverage if other conflicting state interests are involved or are adversely affected.

In conclusion, the Hyde Amendment and P.A. 80-1091 are spending enactments which easily withhstand constitutional attack on all due process and equal protection grounds. The district court's holding of unconstitutionality resulted from a misuse of the concept of the legitimacy of state interests. As a consequence, the district court engaged in an essentially legislative function. Its decision must be reversed.

ARGUMENT

I.

INTRODUCTION

This is an appropriations case involving funding of social and economic programs. This case does not involve state infringement of the right to privacy. Thus, it is very different from the landmark abortion decisions handed down by this Court in *Roe* v. *Wade,* 410 U.S. 113 (1973), *Doe* v. *Bolton,* 410 U.S. 179 (1973), *Planned Parenthood* v. *Danforth,* 428 U.S. 52 (1975), *Bellotti* v. *Baird,* 428 U.S. 132 (1975), and *Bellotti* v. *Baird,* ..... U.S. ....., 99 S.Ct. 3035 (1979). Those were all privacy cases involving state statutory provisions which unduly burdened the right to privacy by imposing penal sanctions on either the woman seeking an abortion or on her physician. The statutory provisions in those cases had the effect of making the act of abortion, in one set of circumstances or another, a crime. For example, in *Roe* v. *Wade* all abortions except to save the life of the mother were a crime; in *Doe* v. *Bolton* all abortions, except with certain indications, were a crime; in *Planned Parenthood* v. *Danforth* abortions on minors and married women, except with the requisite parental or spousal consent, were a crime; in *Bellotti* v. *Baird* abortions on minors, except with parental or judicial consent, were a crime.

The abortion funding restrictions at issue here do not in any way impose criminal or other legal sanctions upon the woman seeking or the physician performing an abortion. They do not impose burdens on the decision to abort or on its effectuation. *Maher* v. *Roe,* 432 U.S. 464, 474 (1977).

This is an appropriation of funds case. It is a case about money—money now being provided for abortion in Illinois. Contrary to the wishes of a majority of the American people as expressed in Congress through the Hyde Amendment and the majority of the people of the State of Illinois as expressed in its General Assembly through P.A. 80-1091.

This case presents a narrow statutory and four broad constitutional issues.

The first constitutional question asks whether, and if so to what extent, ought this Court reassign Congressional and state legislative budgetary priorities. This issue has two branches: a political question branch and a judicial restraint branch.

The second constitutional issue asks whether this case has already been totally resolved by *Maher* v. *Roe* and *Poelker* v. *Doe,* 432 U.S. 519 (1977), and is thus foreclosed from further constitutional consideration.

The third constitutional issue asks whether there is a substantive right to public funding for abortion, either because of the nature of abortional freedom or because of a possible right to social welfare for health purposes.

The fourth issue deals with equal protection aspects of this case—specifically, whether the manner in which social welfare for medical purposes is dispensed under federal and state medicaid programs violates equal protection.

The statutory question asks whether the federal medicaid scheme requires the participating states to fund abortions to the extent of the Hyde Amendment, or in all situations which a physician may deem abortion "medically necessary."

Since the district court held the Hyde Amendment and its Illinois counterpart, P.A. 80-1091, unconstitutional on equal protection grounds, the major emphasis of this Brief has been placed on the equal protection aspects of this case.

II.

MAHER v. ROE AND POELKER v. DOE HAVE RESOLVED ALL SIGNIFICANT CONSTITUTIONAL QUESTIONS AGAINST THE PLAINTIFFS

In *Maher* v. *Roe,* 432 U.S. 464 (1977), and *Poelker* v. *Doe,* 432 U.S. 519 (1977), this Court used the terms "nontherapeutic" and "therapeutic." The district court construed "nontherapeutic" to mean "purely elective" abortion and "therapeutic" to mean "medically necessary" to improve health. *Zbaraz* v. *Quern,* 469 F.Supp. 1212, 1219 (N.D.Ill. 1979). As a result of its misinterpretation of "therapeutic," the district court believed that the *Maher* and *Poelker* cases dealt only with the constitutionality of abortion funding restrictions that precluded funding for "purely elective" abortions, as opposed to the so-called "medically necessary" abortions. Accordingly, the lower court concluded that *Maher* and *Poelker* did not dispose of the issue of "health" related abortion presented here. (Intervenors emphatically deny that the Hyde Amendment and P.A. 80-1091 result in significant health problems for pregnant women, because there exist effective and safe

alternative treatments which are publicly funded under Medicaid.)

However, a careful study of the *Poelker* and *Maher* decisions reveal that there is no sound basis for distinguishing those decisions from the instant case, and that all significant constitutional issues presented here have been thoroughly considered by this Court and resolved against plaintiffs.

In *Maher* this Court concluded that there was no fundamental right to a state supported abortion or to have the state "pay for any pregnancy related expenses," *Maher* v. *Roe,* 432 U.S. at 469. This principle is applicable here, unless one somehow has a constitutional right to a publicly funded abortion if "health" could thereby be improved. However, *Maher* also held that there is no "constitutional obligation to pay *any* of the medical expenses of indigents." *Maher* v. *Roe,* 432 U.S. at 469 (emphasis added). It thus follows that there is no fundamental constitutional right to have the State pay for any medical procedure, including abortions, even if the abortion may improve health. Indeed, if this Court in *Maher* had believed that only a "purely elective" abortion were at issue, as opposed to one for which "health" may somehow be improved (*i.e.,* a so-called "medically necessary" abortion), there would have been no reason for this Court to begin its analysis of the *Maher* case with the premise that there is no "constitutional obligation to pay any of the medical expenses of indigents." *Id.* There would have been no reason for that analysis to go beyond the narrow circumstances of a "purely elective" abortion situation. *Maher* dealt with the broader question of constitutional obligations to fund health related expenses and concluded that no such obligation existed under the Constitution.

Poelker v. *Doe,* 432 U.S. 519 (1977), announced by this Court with *Maher,* reinforces this interpretation of *Maher.* Upheld in *Poelker* was the policy of the Mayor of St. Louis prohibiting abortions in city hospitals "except when there was a threat of grave physiological injury or death to the mother." *Id.* at 520. It was the constitutionality of this very restrictive policy that came before this Court in the *Poelker* case, not a policy which precluded only non-health related abortion from being performed in city hospitals. Indeed, the Circuit Court opinion had indicated that Mayor Poelker understood the policy to allow abortion in city hospitals only if the life of the mother was endangered. *Doe* v. *Poelker,* 515 F.2d 541, 552 (8th Cir. 1975). This policy was then far more restrictive than the standard of "medical necessity" that the plaintiffs now urge on this Court.

A careful study of the facts of the *Poelker* case reveals that the plaintiff Jane Doe did not seek an "elective" abortion, but rather a "medically necessary" or "health" related abortion. Support for this is found in the affidavit submitted by plaintiff Jane Doe in support of her Complaint and in her Respondent's Brief submitted to this Court in *Poelker* v. *Doe.* Her affidavit stated:

> * * * that the ordinary and routine medical procedure *in her situation* is to perform the abortion and hysterectomy in one surgical procedure, rather than two separate and distinct procedures, * * *.

Paragraph 8, of Jane Doe's Affidavit, quoted in Brief of Petitioner Mayor Poelker at 14, submitted to this Court in *Poelker* v. *Doe,* No. 75-442, Oct. Term, 1976 (emphasis in original).

> The present and real threat by defendants to implement and enforce the policy herein challenged deters said plaintiff from receiving medical care in a manner beneficial for her health and safety and in a manner consistent with the highest standards of medical practice.

Id. at para. 9.

Respondent Jane Doe's Brief alleged that "Respondent Doe's medical record indicates confirmed cervical fibroid tumors, polyps, vaginitis, erythema, trichomycosis and an extremely retroverted uterus." Brief of Respondent Jane Doe, at 6, submitted in *Poelker* v. *Doe,* No. 75-442, October Term 1974. See also *Doe* v. *Poelker,* 515 F.2d 541, 543 (8th Cir. 1975). Mayor Poelker claimed, in response, that Jane Doe had no medical need for an abortion. Indeed, the dispute of facts which this Court found "unnecessary to describe or resolve this conflict" (*Poelker* v. *Doe,* 432 U.S. at 520 n. 1) were exactly opposite to those understood by the district court, *i.e.,* that Jane Doe claimed to seek an "elective" abortion.[2] In light of Jane Doe's claim that she had a medical need for the abortion and Mayor Poelker's claim that she did not, it would have been logically and legally necessary to make a finding that Mayor Poelker's version of the facts was correct if this Court had believed a distinction between "health" related abortions and "purely

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[2] At *Zbaraz* v. *Quern,* 469 F.Supp. at 1219 n. 9, the district court concluded that the plaintiff in *Poelker* had "'no medical reasons to justify abortion,' such as 'severe sickness of the patient,'" citing from the Eighth Circuit Court of Appeals decision in *Doe* v. *Poelker,* 515 F.2d 541, 543 (8th Cir. 1975). The district court apparently misunderstood the Eighth Circuit's point as well as the point of the physicians who examined Jane Doe. What was meant by both the Eighth Circuit and the examining physicians was that there were "no medical reasons" for which an abortion *would be permitted in the city hospitals of St. Louis,* not that Jane Doe's proposed abortion was "purely elective." The reference to "*severe* sickness of the patient" was made to indicate the nature of a medical problem for which an abortion *might* be allowed in the city hospitals.

elective'' abortions was constitutionally significant, as the district court in this appeal assumed. The reason it was ''unnecessary to [decide the dispute of facts] to . . . resolve this conflict'' is because the *Maher* holding, which was applied to resolve the *Poelker* case (*Poelker* v. *Doe*, 432 U.S. at 520), also resolved the case against Jane Doe, regardless of whether or not her abortion was ''medically necessary.'' In short, the state of Jane Doe's health was constitutionally irrelevant:

> We agree that the constitutional question presented here is identical in principle with that presented by a state's refusal to provide Medicaid benefits for abortions while providing them for childbirth. This was the issue before us in *Maher* v. *Roe*. . . . For the reasons set forth in our opinion in that case, we find no constitutional violation by the City of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions.

Poelker v. *Doe*, 432 U.S. at 521.

Moreover, even if Jane Doe did not personally suffer from the health problems alleged, as claimed by Mayor Poelker, it is important to note that she represented a class of woman who sought abortions in the city hospital for both health and elective reasons. Thus, the exact nature of her medical problems had no particular legal significance.

If *Poelker* and *Maher* are read in light of this Court's holding in *Doe* v. *Bolton*, 411 U.S. 179 (1973), further support of this interpretation of *Maher* and *Poelker* is found. In *Bolton*, this Court struck down a number of provisions of the Georgia ''reform'' abortion statute, but explicitly upheld that part of a criminal statu-

tory provision which permitted abortion only when ''based upon [the physician's] best clinical judgment that an abortion is necessary.'' *Doe* v. *Bolton*, 410 U.S. at 192. It follows that abortions not necessary in the ''best clinical judgment'' of the physician could be proscribed. The ''clinical judgment of the physician'' is a judgment related to the ''health'' of the patient, since a physician's expertise can only be assumed to relate to health improvement. *Id.* Consequently, all ''right to privacy'' abortions are ''health'' related abortions, and the so-called ''purely elective'' abortions, which the district court equated with ''nontherapeutic'' abortion, does not fall within the constitutionally protected zone of privacy. If this Court intended ''nontherapeutic'' as used in *Maher* and *Poelker* to mean ''purely elective,'' then the *Maher* and *Poelker* decisions stand for the self-evident proposition that the State does not have to pay, under its medicaid program, for acts which the state may constitutionally declare illegal. Such a ruling would be jurisprudentially and constitutionally meaningless and could not have inspired the vigorous dissents of *Maher* and *Poelker*. One can only conclude that ''nontherapeutic'' as used by this Court in *Maher* and *Poelker* had a much broader meaning that that given to it by the district court.

Further support for this interpretation of the meaning of ''nontherapeutic'' as used by this Court in *Maher* is found in *Beal* v. *Doe*, 432 U.S. 438 (1977). In *Beal*, this Court wrote that ''when Congress passed Title XIX in 1965, *nontherapeutic* abortions were unlawful in most states'' (*Beal* v. *Doe*, 432 U.S. at 447 [emphasis added]), and noted that even at the time of ''*Roe* . . . at least 30 states had statutory prohibitions against nontherapeutic abortion. *Roe* v. *Wade*, 410 U.S. 113, 118 n.2 (1973).'' *Beal* v. *Doe*, 432 U.S. at 447 n.12. Almost all of the

criminal abortion statutes to which this Court referred precluded abortion unless necessary to save the life of the mother. *See* George, *Current Abortion Laws: Proposal and Movements for Reform,* 17 WEST. RESERVE L. REV. 371, 375-379 n. 21-24, 31, 43, 44, 45 (1965).

Four federal courts have agreed with this interpretation of the meaning of nontherapeutic: *D.R.* v. *Mitchell,* 456 F. Supp. 609 (D. Utah 1978); *Woe* v. *Califano,* 460 F.Supp. 234 (S.D. Ohio 1978); *Doe* v. *Mundy,* 441 F.Supp. 447 (E.D. Wisc. 1977). Further, this Court vacated the judgment of the lower court preliminarily enjoining the Hyde Amendment in *McRae* v. *Califano,* 433 U.S. 916 (1977), a decision apparently based on this understanding of nontherapeutic.

The only additional questions raised below dealt with the Equal Protection Clause. *Maher* however has resolved those as well. First, indigency is not a suspect class. *Maher* v. *Roe,* 432 U.S. at 470-71. The fact that a physician deems an abortion "medically necessary" surely does not thrust the woman into a "suspect class" for equal protection analysis. Second, withholding of funds for abortion does not "penalize" the abortion decision. *Maher* v. *Roe,* 432 U.S. at 474. The fact that a physician may deem an abortion "medically necessary" surely does not make "penal" an otherwise non-penal statute. Third, promotion of the state's interest in childbirth over abortion with a funding and welfare policy does not violate equal protection. *Maher* v. *Roe,* 432 U.S. at 469-70. The fact that a physician may deem an abortion "medically necessary" surely does not alter the fundamental authority of the legislature to select and pursue with its limited resources those interests of state which at any given time appear to be most essential.

It thus follows that this case does not present a single significant constitutional issue not resolved against plaintiffs in *Maher* and *Poelker.*

III.

ABORTION FUNDING RESTRICTIONS ON HEALTH WELFARE PROGRAMS ARE A PROPER EXERCISE OF LEGISLATIVE SPENDING POWER AND THE JUDICIARY SHOULD DEFER TO LEGISLATIVE DISCRETION IN SUCH SPENDING MATTERS

Federal welfare programs, like the Medicaid Title, are enacted pursuant to the taxing power of Congress (U.S. CONST. art. 1, §8), its appropriations power (U.S. CONST. art. I, §9, cl. 7), its power to promote the general welfare (U.S. CONST. art 1, §8, cl. 1), as well as its power under the "necessary and proper clause" (U.S. CONST. art. 1, §8, cl. 8). The Hyde Amendment represents a congressional decision *not to spend money* for abortion in federal social welfare programs, since to do so would vitiate other state interests. The power to spend is a constitutionally delegated power of Congress. It is not a constitutionally required obligation. How this power is exercised is a matter for Congress to determine.

Appropriation matters are essentially political in nature,[3]

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[3] The Hyde Amendment has been the subject of extremely protracted and heated debate in Congress. *See:*

122 CONG. REC. H 6647-6661 (daily ed. June 24, 1976);
122 CONG. REC. S 10787-10807 (daily ed. June 28, 1976);
122 CONG. REC. H 8631-8641 (daily ed. August 10, 1976);
122 CONG. REC. S 14562-14570 (daily ed. August 25, 1976);
122 CONG. REC. H 10312-10318 (daily ed. September 16, 1976);
122 CONG. REC. S 16112-16121 (daily ed. September 17, 1976);
122 CONG. REC. S 17296-17302 (daily ed. September 30, 1976);
123 CONG. REC. H 6082-6098 (daily ed. June 17, 1977);
123 CONG. REC. S 11041-11056 (daily ed. June 29, 1977);
123 CONG. REC. H 8327-8353 (daily ed. August 2, 1977);
123 CONG. REC. S 13668-13678 (daily ed. August 4, 1977);

(footnote continued)

are best resolved by the legislature, and are not suited to judicial review. In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court discussed in some detail the nature and applicability of the doctrine of nonjusticiability or the political question doctrine, concluding that "it is the relationship be-

(footnote continued)

123 CONG. REC. H 10128-10134, 10170 (daily ed. September 27, 1977);
123 CONG. REC. H 10829-10838 (daily ed. October 12, 1977);
123 CONG. REC. H 10966-10970 (daily ed. October 13, 1977);
123 CONG. REC. S 17900-17902 (daily ed. October 27, 1977);
123 CONG. REC. S 18584-91, S 18621-22 (daily ed. November 3, 1977);
123 CONG. REC. H 12167-12175 (daily ed. November 3, 1977);
123 CONG. REC. S 19236-19240 (daily ed. November 29, 1977);
123 CONG. REC. H 12485-12494 (daily ed. November 29, 1977);
123 CONG. REC. H 12651-12658 (daily ed. December 6, 1977);
123 CONG. REC. H 12770-75, H 12929-31 (daily ed. December 7, 1977);
124 CONG. REC. H 5363, H 5371 (daily ed. June 13, 1978);
124 CONG. REC. H 10798-10800 (daily ed. September 26, 1978);
124 CONG. REC. S 16312-16338 (daily ed. September 27, 1978);
124 CONG. REC. H 11493-97 (daily ed. October 4, 1978);
124 CONG. REC. H 12468-87, H 12516-20 (daily ed. October 12, 1978);
124 CONG. REC. H 12969-75 (daily ed. October 14, 1978);
125 CONG. REC. H 5253-5262 (daily ed. June 27, 1979);
125 CONG. REC. S 9851-9873 (daily ed. July 19, 1979);
125 CONG. REC. S 13253-55 (daily ed. September 24, 1979);
125 CONG. REC. S 13573-75 (daily ed. September 27, 1979);
125 CONG. REC. S 13736-43 (daily ed. September 28, 1979);
125 CONG. REC. H 8856-58 (daily ed. October 9, 1979);
125 CONG. REC. S 14325 (daily ed. October 10, 1979);
125 CONG. REC. H 9884-86 (daily ed. October 30, 1979);
125 CONG. REC. S 16710-14 (daily ed. November 15, 1979);
125 CONG. REC. H 10955-59 (daily ed. November 16, 1979);
125 CONG. REC. S 16882-83 (daily ed. November 16, 1979);
125 CONG. REC. H 11614-11623 (daily ed. December 6, 1979);
125 CONG. REC. H 11770-76 (daily ed. December 11, 1979).

tween the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the political question." *Baker* v. *Carr*, 369 U.S. at 210. To determine if that doctrine should be invoked, this Court set forth certain guidelines:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding it without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherance to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. *Carr*, 369 U.S. at 217.

Although the issues presented to this Court here are different from those in *Baker*, which upheld the justiciability of legislative reapportionment, at least some of the "tests" for determining whether to apply this doctrine are applicable here and should guide this Court in its review of the judgment of Congress involved in this case.

For example, in this case there is a "textually demonstrable constitutional commitment of the issue" of the appropriations power to Congress, "a coordinate political department" under Article I, §9, cl. 7 of the U.S. Constitution. There is a "lack of judicially discoverable and manageable standards" for determining which, and to what extent, the State can most wisely promote and protect with its limited resources the various and conflicting legitimate state interests involved in the abortion decision. There is the "impossibility of deciding, without an initial policy

determination of a kind clearly for nonjudicial discretion'' which of the various conflicting legitimate state interests at stake in abortion should be preserved. There is the ''impossibility of undertaking independent resolution'' of the issue of whether the courts should promote the health of citizens—if indeed ''health'' is significantly endangered—rather than other important and legitimate state interests ''without expressing lack of respect due coordinate branches of government.'' Finally, there is the ''potentiality of embarrassment from multifarious pronouncements by various departments'' (here, from the Congress and the judiciary) ''on one question'': how various legitimate, perhaps competing, state interests should be promoted with the resources available to the State. Clearly, many of the tests for invocation of the political question doctrine are satisfied here.

This Court has very broad powers of judicial review and may well decide this case is justiciable. *Cf. United States* v. *Lovett,* 328 U.S. 303, 313 (1945). However, even if the close relationship between this case and ''political question'' cases does not counsel a finding of nonjusticiability, it certainly counsels judicial restraint, a low level of judicial review, and judicial deference to appropriations decisions of Congress.

This Court has held that the President has no power to impound funds which Congress has expressly directed to be spent. *Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524 (1838). See also *Train* v. *City of New York,* 420 U.S. 35 (1975). Such decisions promote respect for and protect separation of powers and our system of checks and balances. Nothing less is at stake here.

This Court, as far as can be determined, has never held an Appropriations Act of Congress invalid either under strict scrutiny or under the rational relationship test. There are important reasons which counsel this Court against

establishing such a precedent in this context. The various demands which the Congress makes upon the Treasury to further and protect valid governmental interests should not be subject to judicial review merely because an individual physician believes a particular medical procedure is ''necessary.''

As Mr. Justice Stewart, writing for this Court, stated in *Dandridge* v. *Williams,* 397 U.S. 471, 478 (1969),

> [t]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public funds among the myriad of potential recipients.

IV.

THERE IS NO CONSTITUTIONAL RIGHT TO PUBLIC FUNDING FOR ABORTIONS OR TO SOCIAL WELFARE FOR HEALTH PURPOSES

In *Maher* v. *Roe,* 432 U.S. at 469, this Court held that there is no constitutional right to public funding for abortion or for any medical expense. This issue is thus foreclosed from further constitutional debate, and the district court appears to have agreed. *Zbaraz* v. *Quern,* 469 F.Supp. at 1217.

Nonetheless, several different reasons suggest it is necessary to discuss the substantive, due process aspects of this case: 1) despite its explicit language, the district court's decision may have been premised in part on a belief that there is a substantive right to welfare for medical expenses;[4] 2) equal protection analysis[5] is occasionally re-

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[4] Although the district court claimed its decision was based on equal protection grounds, *Zbaraz* v. *Quern,* 469 F.Supp. at 1218, it did emphasize the "pregnant woman's interest in her health. . . ." *Id.* 1221.

[5] Sometimes referred to as "substantive equal protection." *See, e.g.,* Tussman and tenBroek, *The Equal Protection of the Law,* 37 CALIF. L. REV. 341 (1949).

lated to substantive due process rights (*e.g., Shapiro* v. *Thompson,* 394 U.S. 618, 638 [1968]); 3) the nature of the right to privacy and the non-existence of a general constitutional right to welfare for medical purposes provide background for the discussion of the equal protection issues raised in this case; 4) in order to establish the inapplicability of "strict scrutiny" as the appropriate standard for judicial review, a thorough discussion of the due process aspects of this case is indicated.

A. The Essential Nature of Constitutional Privacy Is Freedom from Governmental and State Interference and Intrusion in One's Private Sphere, Not a Right to Public Involvement and Support.

In *Roe* v. *Wade,* 410 U.S. at 152, this Court announced that "a right of personal privacy, or a guarantee of certain zones of privacy, does exist under the Constitution," and held that "this right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. Aspects of abortion thus fall within the sphere of constitutionally protected privacy.

The right to privacy, by its very nature, is a "non-interference" right. At common law it protects the individual from interference or invasion from others. *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250, 251 (1891). As a constitutional right, it protects the individual from interference through state action. For example, in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), this Court struck down a state statute making use of contraceptives a crime because the statute invaded "the zone of privacy." *Id.* at 485. If the statute were upheld, "the police [would be allowed] to search the sacred precincts of marital bedroms for tell-tale signs of the use of contraceptives." *Id.* at 485-86.

In *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), this Court noted that "if the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted *governmental intrusions* into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (Emphasis added.)

In *Stanley* v. *Georgia,* 394 U.S. 557 (1969), a case involving possession of obscene materials, this Court noted that the right to receive information and ideas "takes on an added dimension" in the context of a prosecution for possession of something in one's own home" since "also fundamental is the right to be free, except in very limited circumstances, from *unwarranted governmental intrusions* to one's privacy." *Id.* at 564 (emphasis added).

In *Whalen* v. *Roe,* 429 U.S. 589 (1977), this Court tested the constitutionality of a New York statute which required that the names of persons who obtained prescribed drugs be recorded. The challenge was based on the theory that the statute violated constitutionally protected rights of privacy. In examining the scope of constitutional privacy, Mr. Justice Stevens, writing for a unanimous Court, noted that "cases sometimes characterized as protecting 'privacy' have in fact involved two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-99. In this regard, the Court quoted Professor Philip Kurland:

> The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual

not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion. The private I, the University of Chicago Magazine 7, 8 (autumn 1978). The first of the facets which he describes is directly protected by the Fourth Amendment; the second and third correspond to the two kinds of interest referred to in the text.

Whalen v. *Roe*, 429 U.S. at 599.

These cases all illustrate the principle that constitutional privacy protects the individual's zone of privacy from state intrusion. The Constitution protects certain private activities from the State. It creates no obligation to implement the exercise of such activities.

There is no "right to an abortion," only a right of privacy "which is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. at 153. This point was emphasized in *Maher* v. *Roe*, 432 U.S. 464 (1977), where this Court noted that the district court "read our decisions in *Roe* . . . as establishing a fundamental right to abortion. . . . We think the District Court misconceived the nature and scope of the fundamental right recognized in *Roe*." *Id.* at 471.

Even if this Court ignores precedent and holds that there is a relationship between the right to privacy and governmental appropriations, it does not follow that abortion must be funded. In *Shapiro* v. *Thompson*, 394 U.S. 618 (1968), this Court held that a constitutional right exists to travel interstate. *Id.* at 630. But, as this Court noted in *Maher*, the existence of this right does not require the State to provide bus tickets to indigent citizens to enable them to effectuate a decision to travel.

Maher v. *Roe*, 432 U.S. 464, 475 n.8. Similarly, the State need not assist a pregnant woman to effectuate her abortion decision.

As Chief Justice Burger's concurring opinion in *Maher* v. *Roe* makes clear, the "Court's holdings in *Roe* v. *Wade* . . . and *Doe* v. *Bolton* . . . simply require that a State not create an absolute barrier to a woman's decision to have an abortion. These precedents do not suggest that the State is constitutionally required to assist her in procuring it." *Maher* v. *Roe*, 432 U.S. at 481.

The incongruity implicit in the district court's decision that certain abortions must be publicly funded is that a constitutional freedom from state intrusion into zones of *privacy* is thence transformed into a right to *public* support and *public* involvement in such private matters. The district court's decision is premised on the notion that a right of non-interference by the State in the zone of individual privacy requires, in addition, state action to effectuate private decisions about private matters. This is quite inconsistent with the basic notion and tradition of the right to privacy.

If constitutional privacy precludes the state from interfering with one's decision to educate one's children in Germanic language skills (*Meyer* v. *Nebraska*, 262 U.S. 390 [1923]), or to send one's child to a private school (*Pierce* v. *Society of Sisters*, 268 U.S. 510 [1925]), does it require the State to pay for the teacher of German? Or to fund the private school? (*Cf.* this Court's use of the *Meyer* and *Pierce* analogy to abortion funding in *Maher* v. *Roe*, 432 U.S. at 476-77). If constitutional privacy precludes the state from criminalizing the use of contraceptives (*Griswold* v. *Connecticut*, 381 U.S. 479 [1965]), does it require the State to pay for contraceptives? If constitutional privacy precludes the State from punishing the

use of obscene materials in the home (*Stanley* v. *Georgia*, 394 U.S. 557 [1969]), does it require the State to provide public funding for obscene materials? If constitutional privacy precludes the State from interfering with the abortion decision (*Roe* v. *Wade*, 410 U.S. 113 [1973]), does it require the State to provide public funding for abortion? This Court in *Maher* v. *Roe* unequivocably answered this question in the negative.

Surely, the answers to these questions would not differ if the teacher of German would deem German "educationally necessary," or a school counselor would deem contraceptives "socially necessary," or a mental health professional would deem pornography "psychologically necessary." Yet, under the district court's theory, the existence of this "necessity" somehow transforms the nature of the right to privacy from a right of non-interference by the State into a right which imposes an affirmative obligation on the State to act.

To require, as a matter of constitutional law, public involvement into these private matters would be inconsistent with the basic notion, as well as the logic and tradition, of constitutional privacy. Privacy neither means nor implies State involvement. If anything, it suggests its impropriety.

B. There Is Neither a Constitutional Right of Indigents to Receive Nor a Constitutional Obligation on the States or Federal Government to Pay the Medical Expenses of Indigents.

In *Maher* v. *Roe*, 432 U.S. 464 (1977), this Court dealt directly with the question of the existence of due process rights to medical welfare payments and the existence of a state obligation to provide medical welfare to indigents. This Court, through Mr. Justice Powell, wrote:

> The Constitution imposes no obligation to pay the pregnancy related expenses of indigent women, or indeed to pay any of the medical expenses of indigents.

Id. at 469.

This principle is perfectly consistent with past decisions of this Court. For example, in *Dandridge* v. *Williams*, 397 U.S. 471 (1969), this Court recognized that the "administration of public welfare assistance . . . involves the most basic needs of impoverished human beings" (*Id.* at 485), but nonetheless held that

> the intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

Id. at 487.

The *Maher* holding is also consistent with *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), which this Court distinguished on the basis of Connecticut's monopoly over the means to dissolve marriages legally. *See also United States* v. *Kras*, 409 U.S. 434 (1973), and *Ortwein* v. *Schwab*, 410 U.S. 656 (1973) (*per curiam*). Since it is clearly settled that there is no constitutional right to free medical treatment, regardless of the seriousness of the medical problem, and since neither the State of Illinois nor the federal government monopolizes the means for terminating pregnancies, further discussion of due process rights of indigents for social welfare or any constitutional obligations of states to provide welfare for medical treatment is unnecessary.

To the extent the decision of the district court is based on any notion of a substantive constitutional right which obligates the federal government or state to provide welfare for abortions or for any medical expenses, it is wholly in error.

V.

NEITHER THE HYDE AMENDMENT NOR ITS ILLINOIS COUNTERPART, P.A. 80-1091, CONFLICT WITH EQUAL PROTECTION PRINCIPLES OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION.

After concluding in *Maher* v. *Roe,* 432 U.S. 464 (1977), that the "Constitution imposes no obligation on the States . . . to pay any of the medical expenses of indigents" (*Id.* at 469), this Court emphasized that "when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." *Id.* at 469-70.

The constitutional limitations to which this Court referred are obviously those imposed by the Equal Protection Clauses of the Fifth and Fourteenth Amendments. Both the Hyde Amendment and P.A. 80-1091 satisfy all applicable analytical tests developed by this Court to evaluate constitutionality under equal protection principles.

In the course of the following analysis it will be assumed that the principles which flow from the Equal Protection Clause of the Fourteenth Amendment are identical to the principles of equal protection of the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954); *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); Karst, *The Fifth Amendments Guarantee of Equal Protection,* 55 N.C.L. Rev. 540 (1977).

When confronted with an equal protection issue, "[T]he Courts must reach and determine the question whether the classifications drawn in the statute are reasonable in light of its purpose . . ." *McLaughlin* v. *Florida,* 379 U.S. 184, 191 (1964). This Court has stated the basic framework for equal protection analysis:

> We must decide, first, whether [state legislation] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination.

San Antonio School Dist. v. *Rodriguez,* 411 U.S. 1, 17 (1973). Accord *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307, 312, 314 (1976). Cited with approval and followed, *Maher* v. *Roe,* 432 U.S. at 470.

The order of analysis will be reversed here, since the district court rejected strict scrutiny as the appropriate standard for judicial review and based its holding on its understanding of legitmacy of state interests. First, the legitimacy of the legislative purposes served by the federal and state funding restrictions will be discussed. Second, the rationality of the means of achieving that purpose will be discussed. Later in this Brief, the inapplicability of "strict scrutiny" as the standard of judicial review will be discussed.

A. Legitimacy.

1. The Purposes of the Hyde Amendment and P.A. 80-1091 Are Legitimate.

The purposes of the abortion funding restrictions are several: protection of fetal life, encouragement of childbirth, recognition of public morals, resolution of demographic concerns, and preservation of fiscal integrity. Each of these state goals is legitimate. Since a major conceptual error of the district court was its misuse of legitimacy, only legitimacy will be discussed here. The rationality of the abortion funding restrictions as a means of achieving the legitimate goals will be discussed separately.

a) The Protection of Fetal Life.

The sponsor of the original HEW Labor Abortion finding restriction, U.S. Representative Henry Hyde, stated that the purpose of this law was to "protect that most defenseless and innocent of human lives, the unborn . . ." 122 *Cong. Rec.* 20410 (1976).

In its landmark abortion decision in *Roe* v. *Wade,* 410 U.S. 113 (1973), this Court held that the state has "important and legitimate interest in protecting the potentiality of human life." *Id.* at 162. This point has been repeated frequently in subsequent abortion decisions. See *Colautti* v. *Franklin,* —— U.S. ——, 99 S. Ct. 675, 681 (1979); *Beal* v. *Doe,* 432 U.S. 438, 446 (1977); *Planned Parenthood of Central Missouri* v. *Danforth,* 423 U.S. 52, 61 (1975).

In *Maher* v. *Roe,* this Court referred to the State's "interest in the . . . potential life of the fetus," (432 U.S. at 472); once to the state's "direct interest in protecting the fetus," (432 at 478 n. 11); and once to the state's "strong interest in protecting the potential life of the fetus." 432 at 478. Distinguishing abortion from other medical procedures, this Court emphasized that "[other] medical procedures do not involve the termination of potential human life." *Maher* v. *Roe,* 432 U.S. at 480. Indeed, this Court's decision in *Maher* upholding the Connecticut abortion funding restriction was necessarily based on its holding that the state's interest in the human fetus is legitimate.

In none of these decisions did this Court limit the legitimacy of the state's interest to the viable human fetus. In *Roe* v. *Wade,* as well as in *Maher* v. *Roe,* this Court held that the "interest [in protecting the potential life of the fetus] exists throughout the pregnancy, 'grow[ing] in substantiality as the woman approaches term'." *Roe* v. *Wade,* 410 U.S. at 162-163; *Maher* v. *Roe,* 432 U.S. at 478. In *Maher,* the abortion funding restriction at issue was upheld although it applied to all stages of pregnancy. This is only possible if the state's interest in the fetus is legitimate throughout all of pregnancy. Nonetheless, the district court held that if the "pregnant woman's interest in her health" is in conflict with the "state's interest in the non-viable fetus . . . the state's interest is not legitimate." *Zbaraz* v. *Quern,* 469 F.Supp. at 1221.

This use of the concept of legitimacy is totally incorrect. *See* this Brief at V, A. Once an interest of state is legitimate, it remains legitimate. It does not loose its legitimacy because a court believes that the State ought to have decided to promote a different legitimate interest. Legitimacy is not determined by balancing state interests, one against the other.

b) The Encouragement of Childbirth[6]

This Court has held: 1) that the right of privacy "implies no limitation on the authority of the state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds" (*Maher* v. *Roe,* 432 U.S. at 474); 2) that the State "unquestionably has a 'strong and legitimate interest in encouraging normal childbirth' " (432 at 478, quoting from *Beal* v. *Doe,* 432 U.S. 438, 446 (1977); 3) held the state's interest in encouraging normal childbirth exceeds the level required to satisfy the rational basis test (432 at 479); and 4) that "the Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth . . .' *Poelker* v. *Doe,* 432 U.S. 519, 521 (1977).

c) The Recognition of the Moral Precepts and Consciences of the American People.

In both the U.S. Congress and in the Illinois General Assembly, one of the reasons articulated in support of the abortion funding restrictions was to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant. For example, Senator James Buckley, in support of the Hyde Amendment, stated that Congress should not permit federal funds to be disbursed for a "procedure that appalls the conscience of a very substan-

[6] Although the state's interest in prenatal human life and its interest in "childbirth" have both fiscal and demographic importance, the two interests are sufficiently different to justify separate treatment. In addition to the fiscal and demographic impact of increased and decreased birthrates, the state's interest in prenatal human life can be justified additionally by the *raison d'etre* of the State to protect the unalienable rights of man, among which is life. See, *e.g.,* the Declaration of Independence.

tial percentage of the American taxpayers." 122 Cong. Rec. 20410 (1976). Senator Bartlett said, "I just do not think . . . we should feel we have a right or an obligation to finance abortions, which are simply considered an anathema by many, many people in this country." 122 Cong. Rec. 27679 (1976).

In the Illinois General Assembly, Senator Lemke, Senate sponsor of P.A. 80 1091 stated:

> My people don't want abortions being performed with their money. If it costs them more to support these children after they're born, they will pay that money gladly, as long as its properly used.

Illinois Senate, *Transcript of Debate on H.B.* 333, June 27, 1977. A. 82.

Respect for the consciences and moral precepts of its citizens has always been considered a legitimate end of state.

d) The Fiscal and Demographic Interests of the State.

The House sponsor of the Illinois abortion funding restrictions, Representative Harold Leinenweber, articulated a fiscal and demographic basis for the Hyde Amendment and P.A. 80-1091:

> Another compelling reason for the statute, I think we should look to the fact that we are now in the State of Illinois and elsewhere, at below zero population growth. I would suggest to you that it is a very sound fiscal reason for the state not to encourage the destruction of its unborn, and that is, to consider the fact that when those of us reach retirement age, that we have some children left to supply the money to pay for our retirement and to take care of us.[7]

[7] Illinois House of Representatives, *Transcript of Debate on H.B. 333,* November 3, 1977. A. 65.

Certainly, the fiscal and demographic interests of the State may be considerable in this regard. As this Court stated in *Shapiro* v. *Thompson,* 394 U.S. 618 (1968), the federal government and the States have "a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program." *Id* at 633. In addition this Court observed in *Maher* v. *Roe*:

> [A] State may have legitimate demographic concerns about its population growth. Such concerns are basic to the future of the state and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth.[8]

2. "Legitimate State Interests" in Constitutional Law.

In the jurisprudence of this Court, "legitimacy" is a concept used to describe those goals and interests which the State may pursue or protect under the Constitution.

Illegitimacy refers to the constitutional impermissibility of an explicitly or implicity articulated goal or interest of state. For example,

> . . . the purpose of inhibiting migration by needy persons into the state is constitutionally impermissible.

Shapiro v. *Thompson,* 394 U.S. 618, 629 (1968).

> If a law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them it [is] patently unconstitutional.

[8] 432 U.S. at 478 n.11. See also *Id.* at 481, where Chief Justice Burger noted that "[e]ncouragement of childbirth and childcare is not a novel undertaking. . . . Various governments, both in this country and in others, have made such a determination for centuries."

United States v. *Jackson,* 390 U.S. 570, 581 (1968).

This Court has never held that a legitimate state interest ceases to be legitimate. The constitutional question has always been whether or not the means employed to protect a "legitimate state interest" are irrational or unduly burden fundamental rights. See, *e.g., San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 17 (1973), *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 312, 314 (1976), *Maher* v. *Roe,* 432 U.S. 464, 470 (1977). Thus, an enactment may be constitutionally invalid, yet the interest it promotes and protects remains legitimate. A legitimate state interest does not cease to be legitimate because a court would have ordered the priority of state interests differently than the legislature.

Thus, a physician's judgment that an abortion is "medically necessary" does not "delegitimatize" the states' legitimate interests in prenatal human life and childbirth, or in respecting the moral values of American taxpayers, or in demographic and fiscal matters.

If the legitimacy of state interests are to be determined by balancing the relative import of various state interests, as the lower court believed, a new and radical concept which would have a profound impact on the American system of government would be incorporated into constitutional law. Under the guise of determining the legitimacy of state interests, the judiciary could substitute its views about the desirability of a given interest or goal of state for that of the legislature. Accordingly, if a court believed that a different interest of state ought to have been pursued, it could declare the interest actually pursued "illegitimate". And this could be done without even asking whether the legislation infringes upon fundamental rights, or whether it has a rational or compelling basis. This is

precisely the error of the district court. It disagreed with the order of budgetary priorities set by Congress and the Illinois General Assembly, and condemned this order by concluding that an otherwise legitimate state interest ceases to be legitimate when it conflicts with another judicially preferred interest.

3. The Trial Court's Misuse of the Concept of Legitimate States Interests.

Three times in the course of its short opinion, the district court indicated its misunderstanding and misuse of the concept of legitimate state interest. The court wrote:

> [the protection of the fetus] is a legitimate interest in some circumstances.

Zbaraz v. *Quern*, 469 F.Supp. at 1219.

> Under *Maher*, a state may legitimately prefer childbirth to an elective abortion. We do not believe, however, that a state has a legitimate interest in promoting the life of a non-viable fetus in a woman for whom an abortion is medically necessary.

Id. at 1219.

> We cannot hold that the state has a legitimate interest in preserving the life of a non-viable fetus at the risk of material morbidity and mortality among indigent women.[9]

Id. at 1220.

> [A] pregnant woman's interest in her health so outweighs any state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate.

Id. at 1221.

[9] Defendants do not agree there is increased mortality and morbidity. These quotes are used only to show how the trial court misunderstands and misuses the concept of legitimacy.

In every case the district court employs the concept of the "legitimacy" of a state interest to indicate the conclusion, rather than the starting point of its "equal protection analysis".[10]

Although the analytic framework employed by the district court is not apparent, its conclusion is clear: an otherwise "legitimate" interest of the United States and of the State of Illinois has somehow become "illegitimate". The reason assessed by the district court for the sudden illegitimacy of the state's interest is likewise apparent: the district court simply disagreed with the order of priorities established by the Congress and the Illinois General Assembly among several legitimate state interests, and condemned this order by concluding that an otherwise legitimate state interest has lost its legitimacy.

By declaring an otherwise legitimate state interest illegitimate because of its disagreement with the legislatures' order of budgeting priorities, the district court was able to hold a statute unconstitutional without even subjecting the laws before it to equal protection analysis. The notion of "legitimacy" became a guise by which the district court substituted its judgment for that of the Congress and the Illinois General Assembly. A clearer violation of principles of judicial restraint and deference to legislative judgments cannot be imagined.

Indeed, the district court reintroduced into law the sort of reasoning common to the *Lochner*-era, now under the guise of equal protection analysis. If the notion of the

[10] In spite of the language of the district court's opinion, it is also possible that the district court believed that the state's interest in the fetus was illegitimate for due process reasons, *i.e.*, conflict with a constitutional right to have the State make an effectuation of the abortion decision possible or to a right to welfare for health related reasons. Since neither of these due process rights exist, a decision based on such erroneous assumptions would be wrong.

"legitimate state interest" had been correctly used, the district court would have next asked whether the statute was enacted to further "legitimate interest", is rationally related to that interest, and whether it impinges upon fundamental rights or involves suspect classes thereby requiring "strict judicial scrutiny." If this established framework for equal protection analysis had been followed, the constitutionality of the Hyde Amendment and P.A. 80-1091 would have been apparent.

B. Rationality.

There appear to be two aspects to the question whether a statute rationally furthers legitimate interests: 1) whether the statute effectively achieves the legitimate purpose of state for which it was enacted; 2) whether in achieving those ends it involves classifications without a rational basis, *i.e.*, invidious classifications.

Concerning the effectiveness of the abortion funding restrictions, little need be said. The ubiquity and variety of governmental fiscal programs to influence and regulate public and private behavior testify to their effectiveness. The abortion funding restrictions are no different than these other social and economic programs which are intended to further legitimate state interests.

The standard for determining whether the classifications in a challenged statute are rational has been announced by this Court on numerous occasions. Generally, this Court has upheld any legislative classification based upon any "state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy . . ." *Allied Stores* v. *Bowers,* 358 U.S. 522, 530 (1959). The Hyde Amendment and P.A. 80-1091 clearly satisfy this test.

All legislation involves classifications of some type. "The Constitution invalidates only that governmental choice

which is 'clearly wrong, a display of arbitrary power, not an exercise of judgment.' " Tribe, AMERICAN CONSTITUTIONAL LAW 997 (1978) quoting from *Mathews* v. *Natural Carbonic Gas Co.,* 429 U.S. 181, 185 (1976). "Mathematical nicety" is "not practicable or plausible." *Mathews* v. *de Castro,* 429 U.S. 181, 185 (1976), quoting from *Helvering* v. *Davis,* 301 U.S. 619, 640 (1937). "[T]he Equal Protection Clause does not require that a state must choose between attacking every aspect of the problem or not attacking the problem at all." *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1969). "The problems of government are practical ones and may justify, if they do not require rough accommodations." *Metropolis Theatre Co.* v. *Chicago,* 228 U.S. 61, 69 (1913). *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911). "Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be attained by it." *Home Insurance Co.* v. *New York,* 134 U.S. 594, 606 (1890).

The reasonableness of a classification is a relative matter, and can only be determined by comparing those who are affected by a statute with the ends to be accomplished by it. It involves essentially a means-end analysis.[11]

Consequently, it is necessary to evaluate the Hyde Amendment and P.A. 80-1091 from the perspective of each of their several purposes: protection of prenatal human life, respect for the moral values of taxpayers, and promotion of fiscal and demographic interests. The lower court, however, failed to do this. Rather, it viewed the funding restrictions solely from one of the underlying purposes of medicaid—promotion of health. Since this

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[11] See Tussman and tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

may explain the lower court's erroneous decision, the rationality of the classifications from the perspective of medicaid is dealt with separately.

1. The Hyde Amendment and P.A. 80-1091 Rationally Further Legitimate State Interests in Fetal Life and Normal Childbirth and Employ Reasonable Classifications in Achieving This Legitimate End of State.

In *Maher* v. *Roe* this Court upheld a statute restricting public funds for abortion, finding that it "rationally furthered" the State's "strong and legitimate interest in encouraging normal childbirth . . . . an interest honored over the centuries." *Maher* v. *Roe,* 432 U.S. at 478. The Connecticut statute at issue in *Maher* funded only abortions which were "medically necessary" (*see* § 275(1) of the Connecticut statute, set forth in *Maher* v. *Roe,* 432 U.S. at 466, n.2.) The statutes at issue here fund abortions under a narrower standard, but this difference is of no constitutional importance. The effectiveness of the abortion funding restrictions in "furthering the legitimate state interest" in prenatal human life and childbirth is not lessened by the physician's opinion concerning the "medical necessity" of an abortion.

The Hyde Amendment and the P.A. 80-1091 impact primarily on the medicaid program. Any classification inherent in the medicaid program itself was fully before this Court in *Maher* and upheld.

2. The Hyde Amendment and P.A. 80-1091 Rationally Further the Legitimate State Interest in Respecting the Moral Values of the American People and Employ Entirely Rational Classifications to Achieve this Legitimate End of State.

As a consequence of the Hyde Amendment and P.A. 80-1091, taxpayers who are morally opposed to abortion will not be forced, contrary to their moral precepts, to fund abortion and thereby aid, either directly or indirectly, effectuation of abortion decisions. The Hyde Amendment and its Illinois counterpart have the effect of avoiding a moral "taint" which some citizens may feel if part of their income is used to promote an act they consider morally repugnant; they therefore rationally further the state's legitimate interest in respecting the moral precepts and the consciences of the American people.

From the perspective of the class of taxpayers who maintain strong moral sentiments for or against abortion, the classification is entirely rational, for there is nothing in these laws which precludes those who feel that abortion is a morally proper act to contribute their funds to hospitals, clinics, or physicians who perform abortions. All are permitted to act according to their consciences and to use their money as they deem fit. Without these laws, this would not be possible.

3. The Hyde Amendment and P.A. 80-1091 Rationally Further the Legitimate Fiscal and Demographic Interests of the State and Employ Rational Classifications to Achieve Those Ends.

Congress and the Illinois legislature could rationally conclude that the long term costs of childbirth are less than

similar costs for abortion. A detailed and heavily documented study[12] presents substantial evidence that the availability of free abortion tends to decrease contraceptive use and increase pregnancies to the point at which two or three abortions are necessary to avert one birth.[13] When abortion is employed as a method of birth control, it is irrational merely to compare the cost to the government of a single abortion and a single birth. When the cost of abortion is multiplied by a factor which takes into account higher rates of pregnancy and lower contraceptive utilization, the cost of abortion may well exceed that of funding any births induced by the unavalability of medicaid reimbursement for abortions.[14] There exists mounting evidence that abortion complications—both currently reported and projected—may lead to medicaid costs greatly in excess of those associated with pregnancy complications.[15] Finally,

[12] Hardy, *Privacy and Public Funding, Maher* v. *Roe as the Interaction of Roe* v. *Wade and Dandridge* v. *Williams*, 18 ARIZ. L. REV. 903, *esp.* 924-933 (1977).

[13] *Id.* at 927-929. *See also* Tietze and Dawson, *Induced Abortion: A Fact Book*, REPORTS ON POPULATION/FAMILY PLANNING (December 1973), at 6.

[14] Hardy, *supra* n.12, at 932-933.

[15] *Id.* In April 1977, Allmen, Cates, Jr., Schulz, Grimes and Tyler, Jr., of the HEW Public Health Service Center for Disease Control presented a paper, "Economic Benefits of Reducing Abortion Complications," at the EIS Conference, concluding: "The total direct cost of treating major and minor abortion complications is estimated at $19.4 million in 1975." *Id.* at 4. The authors emphasized that the figure was undoubtedly underestimated. For example, "indirect costs, or opportunity costs of lost work days resulting from abortion morbidity, though undoubtedly significant, are not dealt with. . . ." *Id.* at 1. Other technical influences, all tending to make the estimate conservative, were detailed. *Id.* at 2, 3. The effects of a far larger number of abortions than in 1975, together with the future costs of long-term complications, may be expected to increase the estimate considerably.

the administrative burden imposed on health care facilities by the easy availability of free abortion is great.[16]

The district court erred by simply comparing the short term cost of abortion to childbirth to determine whether the fiscal interest of the state was served through abortion funding restrictions.[17] The fiscal-demographic interest which motivated the Illinois legislature involved the *long-term* effects of abortion on the social and economic welfare of the population. *See* this Brief at 49-50. Thus, there is a rational basis from a fiscal and demographic perspective for the scheme of classification in the laws before this Court.

The Constitution does not require legislative bodies to adopt short term, middle term, or long term economic analyses in exercising their spending powers. If legislatures wish to expend large sums now to maximize benefits in the future, the courts should defer to that judgment. Is it wiser to build an efficient, long-lasting, and expensive road now? Or is it wiser to build a less expensive, less efficient, and temporary road, to free public funds to use to construct schools, hospitals, or court houses? Such decisions are made daily in the legislatures of this Nation, and they are qualified to deal with such problems. Courts are not.

[16] Hardy, *supra* note 12, at 930-32.

[17] *Zbaraz* v. *Quern*, 469 F.Supp. at 1218-1219:

> While the allocation of limited public funds is a legitimate interest of state . . . , we do not believe that the Illinois funding policy is rationally related to this purpose. In fact, the record in this case supports the contrary conclusion that the costs of prenatal care, childbirth and post-partum care are substantially higher than the costs of abortions. . . . In short, P.A. 80-1091 was not, and could not be motivated by econimic concerns.

C. Viewed from the Perspective of the Purposes of the Medicaid Program, the Legislative Classifications in the Hyde Amendment and P.A. 80-1091 Are Reasonable.

Since the district court erroneously saw the Hyde Amendment and P.A. 80-1091 only from the perspective of the medicaid program, rather than from the perspective of the other important and legitimate state interests involved, this legislative classification is considered separately. Any one of the rational bases we have described justifies legislative classifications in social welfare programs.

1. The District Court's Opinion.

The district court noted that the

> principal argument [of plaintiffs] is that, by imposing restrictions on the public finding of medically necessary abortions which are not imposed on other medically necessary operations, P.A. 80-1091 violates their rights to equal protection of the laws. . . .

Zbaraz v. *Quern,* 469 F.Supp. at 1216.

Later the district court held the Hyde Amendment and P.A. 80-1091 unconstitutional because "any possible state interest in the life of a non-viable fetus . . . is not legitimate" for a "woman medically in need of an abortion." *Zbaraz* v. *Quern,* 469 F. Supp. at 1221. Although the district court explained its ruling in terms of the illegitimacy of the state's interest in fetal life when in conflict with the woman's health, it may be that the district court's decision is actually based on what it erroneously believed to be an unreasonable classification in the medicaid program created by these abortion funding restrictions.

2. The Reasonable Bases for the Legislative Classification Created by the Abortion Funding Restrictions.

Abortion is a unique medical procedure. Since this is so, governments are justified in treating it differently in their medicaid programs.

i) Abortion Is a Unique Medical Procedure Since It Involves the Termination of Fetal Life.

In *Maher,* this Court reversed a decision of the lower court which had invalidated a state statutory requirement of prior written request by the pregnant woman and prior authorization by a Department of Social Services. With respect to the argument that such requirements were not imposed for other medical procedures, this Court wrote that "the simple answer to the argument . . . is that such procedures do not involve the termination of a potential human life." *Maher* v. *Roe,* 432 U.S. at 480. The class of women seeking abortion is not "similarly situated" with the class of persons seeking other medical treatment. That the standard for determining eligibility for publicly funded abortions in the Connecticut abortion funding restriction case upheld in *Maher* may have been less restrictive than the standard in this case does not alter the reality that abortion "involves the termination of a potential human life." *Id.*

ii) Abortion Is Unique as a Medical Procedure Since It Is Morally Repugnant to Large Numbers of Taxpayers.

Most medical procedures involve morally neutral acts. There are exceptions, abortion being one. A high percent-

age of American taxpayers find abortion morally repugnant.

iii) Abortion Is Unique as a Medical Procedure Because of Its Profound Demographic and Fiscal Import.

There are both demographic and fiscal reasons to encourage childbirth and discourage abortion, matters of profound potential national import. Clearly, Congress and the States can distinguish between medical procedures on such grounds.

iv) Abortion Is Unusual as a Medical Procedure Since, in Additional to Medical Reasons, There Are Also Non-Medical Reasons for an Abortion.

As this Court pointed out in *Roe* v. *Wade*, 410 U.S. at 153, in addition to medical reasons, there are non-medical reason which a woman may consider in reaching an abortion decision. This Court cited, *inter alia*, the following: "distressful life and future," "distress, for all concerned, associated with the unwanted child," "the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it," "the additional difficulties and continuing stigma of unwed motherhood." The mere existence of these other non-medical reasons increases significantly the potential for abuse within a program which funds abortion under a relaxed standard.

One does not seek an appendectomy, kidney dialysis treatment, or open heart surgery when such procedures are not medically indicated. But abortions are most often sought for reasons which do not relate to health. There are medical and non-medical reasons for the use of drugs, and both the federal government and the State of Illinois

have responded to the potential drug abuse created by this circumstance with controlled substance acts. To the extent the State can protect itself from abuse and fraud (see *Shapiro* v. *Thompson*, 394 U.S. at 637) with a controlled use of drugs act, it can protect its interests with a more restrictive abortion funding policy. Indeed, this Court has recognized the potential for abuse in this context, as well as the State's authority to take measures to prevent such abuse, writing that "it is not unreasonable for the state to insist upon a prior showing of medical necessity to insure that its money is being spent only for authorized purposes." *Maher* v. *Roe*, 432 U.S. at 480.

3. The Constitutional Significance of These Reasonable Bases for the Legislative Classification Involved in the Abortion Funding Restrictions.

As Mr. Justice Cardozo stated, the "wisdom or unwisdom . . . in the scheme of benefits set forth . . . is not for [this Court] to say. The answer to such inquiries must come from Congress, not the Courts. [This Court's] concern . . . is with power, not wisdom." *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937). The district court ignored this principle of this Court's jurisprudence, assuming unto itself the power to determine the relative import of competing state interests. Such "substantive due process", or here, "substantive equal protection," has been rejected by this Court. *See* Holmes' dissent in *Lochner* v. *New York*, 198 U.S. 45 (1905). It should not now be revived.

However, if this Court should deem it appropriate to review the "wisdom, providence, and harmony" of the legislation now before it (but compare *Dandridge* v. *Williams*, 397 U.S. at 484, and *Williamson* v. *Lee Optical Co.*, 348 U.S. at 488), then it should consider the legislative facts discussed in this Brief at 70-83.

D. Strict Judicial Scrutiny Does Not Apply To The Hyde Amendment Or P.A. 80-1091.

Neither the Hyde Amendment nor P.A. 80-1091 warrant invocation of strict judicial scrutiny because neither law involves discrimination against a suspect class, or state action which impinges upon or penalizes the exercise of a fundamental right.

1. Neither the Hyde Amendment Nor P.A. 80-1091 Discriminate Against a Suspect Class.

The case before this Court does not involve discrimination against a suspect class: "An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases." *Maher* v. *Roe,* 432 U.S. at 470-471. Nor is a suspect class created merely because a physician may deem an abortion "necessary." This Court has never held that the asserted needs of welfare recipients generate a suspect class where none had previously existed. Even statutory classifications in governmental social and economic programs which deny "the most basic economic needs" to a particular class have not been subject to strict judicial scrutiny on that account. *Dandridge* v. *Williams,* 397 U.S. at 485. Welfare benefits are not a fundamental right, and neither the state nor federal government is under any sort of obligation to guarantee minimum levels of support. *Maher* v. *Roe,* 432 U.S. at 469.

2. Neither the Hyde Amendment Nor P.A. 80-1091 Impinge Upon a Fundamental Right.

The abortional aspect of the right to primary secured in *Roe* v. *Wade* "implies *no* limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher* v. *Roe,* 432 U.S. at 474. The restrictions now before this Court place "no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." *Id.* at 474. Therefore, neither the Hyde Amendment nor the Illinois law impinge upon the fundamental right recognized in *Roe.*

Any claim that the failure of government to fund any exercise of abortional liberty—including an abortion deemed "necessary"—unduly burdens the woman's freedom must rest on a faulty perception of the nature of the right to privacy.

"[T]he right in *Roe* v. *Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it." 432 U.S. at 473. Here, the "woman's interest" lies in making a decision whether to terminate pregnancy and in preserving her health by the choice of pregnancy termination in preference to other available methods of treatment. There is no legally cognizable distinction between the woman's interest at stake here and the interest considered in *Maher.* Certainly, the woman's health interest is heightened in the present context. But in other circumstances, social, economic, familial or age factors become considerations at least as critical as health may be. *Doe* v. *Bolton,* 410 U.S. at 192. Yet the government would not be obliged under *Maher* to fund abortions because the woman's economic circumstances are especially unfortunate, or because her family is particularly large, or because pregnancy would attach a special social stigma, or because the woman is particularly young or old. Neither is the government obliged to fund abortion merely because a physician may deem the procedure especially appropriate treatment for a health problem.

Regardless of the nature of the woman's interest at stake, there exists no state action which impinges upon the woman's rights in this context. Any "burden" imposed upon the woman arises out of the refusal of the physician to render a particular treatment he deems necessary because he may not be reimbursed by the woman on account of her indigency. Moreover, a *physician's* belief that abortion is "necessary" cannot logically generate any *state* interference with the right to privacy. The Constitution does not provide the physician with any special claim on the Treasury such that the State must respond to a "medical judgment" by opening the public coffers to him. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with State policy." *Maher* v. *Roe,* 432 U.S. at 475. It is one thing for the State to proscribe or penalize performance of an abortion a physician deems necessary. It is quite another thing for the State to encourage the physician through allocation of public funds to employ alternative methods of medical care for the woman in order to preserve both its interest in the protection of fetal life and its interest in maternal health.

The continuing validity of this distinction in the present context is reinforced by reference to an analogy drawn by this Court in *Maher*. *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), and *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), acknowledged the right of parents "to direct the upbringing and care of children under their control." *Maher* v. *Roe,* 432 U.S. at 476. In the face of this fundamental interest, "closely analogous" to the right secured in *Roe* (*id.*), state restrictions on the parents' right to have children instructed in a foreign language and to choose a private rather than a public school education could not survive.

But the parents' right to select foreign language instruction or a parochial school education for their children creates no special obligation in the State to subsidize effectuation of such parental decisions when it finances instruction in English or a public school system. Similarly, state support for medical treatment incident to childbirth generates no compelling obligation to finance effectuation of an abortion decision. The judgment of a parochial school teacher or an instructor in foreign languages that it is "educationally" or "religiously necessary" to the best interests of a particular child to subject him to their discipline cannot affect the freedom of the State to disburse its funds in accord with its own interests. Likewise, the judgment of a physician that an abortion was "medically necessary" does not create any new obligation in the State to reimburse him for having performed it.

Because neither the Hyde Amendment nor P.A. 80-1091 represent state action which burdens or impinges on a fundamental right, strict judicial scrutiny may not be invoked on such grounds.

3. Neither the Hyde Amendment Nor P.A. 80-1091 "Penalize" the Exercise of a Fundamental Right.

In *Shapiro* v. *Thompson,* 394 U.S. 618 (1968), and in *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974), this Court held that States may not establish residency requirements for government benefits when this would "penalize" the right to interstate travel for poor persons.

Any claim that strict scrutiny is the appropriate standard for judicial review in this case because the Hyde Amendment and the Illinois statute constitute a "penalty" on the exercise of a fundamental right must be rejected here on the same grounds this claim was rejected in *Maher*:

Appellees' reliance on the penalty analysis of *Shapiro* and *Maricopa County* is misplaced. In our view there is only a semantic difference between appellees' assertion that the Connecticut law unduly interferes with a woman's right to terminate her pregnancy and their assertion that it penalizes the exercise of that right. Penalties are most familiar to the criminal law, where criminal sanctions are imposed as a consequence of proscribed conduct. *Shapiro* and *Maricopa County* recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.

If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro,* and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa County* did not hold that States would penalize the

> right to travel interstate by refusing to pay the bus fares of the indigent travelers.

Maher v. *Roe,* 432 U.S. at 474-475 n.8.

Nor did *Maricopa County* or *Shapiro* hold that States would penalize the right to travel interstate by refusing to pay bus fares of indigent travelers told that it is "medically necessary" for them to relocate in another State with a different climate. The mere private judgment of an individual physician that a certain course of conduct is in the interest of health—whether to travel or to procure abortion—cannot transform a state social and economic program into what amounts to a criminal law.

Neither the Congress nor the Illinois legislature deny "general welfare benefits" to women who have obtained

tended to encourage women to seek solutions other than abortion to certain problems presented by pregnancy, as was the Connecticut statute at issue in *Maher.* But mere failure to subsidize an abortion, including a so-called medically indicated abortion, does not evidence any intent to punish the woman for having chosen to abort. Otherwise, *any* state refusal to fund an exercise of a fundamental right must be deemed to constitute a "penalty."

Moreover, in *Shapiro* and *Maricopa County* this Court found that the *only* actual goal of the durational residency requirements was to discourage interstate travel. Discouragement of the fundamental right to interstate travel is not a permissible state purpose, and if the law has "no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *United States* v. *Jackson,* 390 U.S. 570, 581 (1968), quoted with approval in *Shapiro* v. *Thompson,* 394 U.S. 618, 631 (1968). But the laws now before this Court have positive purposes other than to "chill" the exercise of a decision whether or not to abort. The state's interest in potential human life and in childbirth, in respecting the moral values of citizens, in demography and in fiscal soundness, all provide "permissible state purposes" for refusal to fund abortion, as this Court has acknowledged.

Finally, in *Maricopa County* this Court suggested that the durational residency requirement there at issue was "cruel" because the indigents were not provided with the "means to obtain alternative treatment" (*Memorial Hospital* v. *Maricopa County,* 415 U.S. at 260-261), an observation stressed by the district court. *Zbaraz* v. *Quern,* 469 F.Supp. at 1220-1221. But, in the present context, both

federal and state medicaid plans fund alternative forms of treatment for the indigent pregnant woman.

Neither the Hyde Amendment nor the Illinois abortion funding restriction burden the right to abort or involve a suspect class. They do not penalize the right of the woman to decide whether or not to terminate pregnancy. Therefore, they are not subject to strict judicial scrutiny, and they must be upheld because they rationally relate to valid state interests.

VI.

THERE ARE ADDITIONAL FACTORS WHICH THIS COURT SHOULD CONSIDER IF, CONTRARY TO ITS JURISPRUDENCE, IT SHOULD UNDERTAKE TO PASS JUDGMENT ON THE WISDOM OF THE CONGRESSIONAL AND STATE ORDER OF PRIORITIES AMONG THE VARIOUS COMPETING STATE INTERESTS INVOLVED IN THE ABORTION DECISION

A. The Existence of Alternative Medical Treatment Which Is Funded Under Federal and State Medicaid Programs Eliminates Any Significant Health Hazard to Indigent Pregnant Women Seeking Abortion

The district court found that the

> "effect of the new criteria . . . will be to increase substantially material morbidity and mortality among indigent pregnant women."

Zbaraz v. *Quern,* 469 F.Supp. at 1220.

The court then found that the states' interest in the fetus becomes "illegitimate" if state refusal to fund may result in increased maternal morbidity. *Id.*

But if the basis for the district court's decision were sound, then the Connecticut statute at issue in *Maher* could

not have been upheld. This Court has held that abortion, at least in the first trimester, is "safer" than childbirth. *Roe* v. *Wade,* 410 U.S. at 163. Failure to fund such abortions, whether or not they are conceived to be "elective", would then result in greater maternal morbidity. To permit states to refuse to fund *any* abortions would therefore be unconstitutional under the district court's theory.

Plaintiffs' affiant indicates that instances exist in which the only effective medical treatment will necessarily result in the death of the fetus. Depp Affidavit I, para. 8 (A. 31). Ectopic pregnancy is such an instance. Depp II, para. 5 (A. 104). In such cases, the federal and state medicaid programs will provide funds for the treatment provided.

Beyond these cases, the most that can be said "is that a particular patient, evaluated on an individual basis, has a certain health profile which creates a higher than normal risk of adverse consequences to her health if her pregnancy is carried to term." Depp II, para. 11 (A. 106). The question is how to cope with that risk. One alternative, of course, is to abort. But the medical literature and the affidavit of plaintiffs' witness on which the lower court's finding was based all support the conclusion that alternative methods of treatment are available to meet the health needs of pregnant women, and that the basis for an asserted "medical need" for an abortion in such cases depends upon the assumption that women who desire abortions will not cooperate with the alternative treatment and that, as a result of their anticipated noncooperation, their health might be damaged.

Indeed, plaintiffs apparently agree with the Affidavit of Dr. Williams where he states that there are methods of treatment other than abortion for a woman with a health

difficulty in pregnancy are available in every case (A. 98, 99), asserting in opposition to Dr. Williams only that abortion is "preferred" (A. 108).

In order to comprehend the nature of the logical error upon which the district court based its finding, it is desirable to consider from the standpoint of medical literature several of the conditions for which the plaintiffs' affiants would certify an abortion as "medically necessary": sickle cell anemia (A. 36); hypertension (A. 32, A. 33, A. 104, A. 110); pre-eclampsia (A. 32, A. 105); varicose veins (A. 37); diabetes (A. 32); psychosis (A. 116).

In a study of 14 pregnancies in 13 patients with homozygous hemoglobin S disease (sickle cell anemia), the Chicago Lying-in Hospital showed that, with proper treatment, no maternal deaths occurred in pregnant women with sickle cell anemia who carried their pregnancies to term.[18] Thirty-six consecutive pregnant patients with sickle cell anemia, treated by prophylactic partial exchange transfusion, also went to term with no maternal mortality.[19] There is no support in the medical literature for abortion as a means of treating sickle cell anemia. The district court found that women who go into sickle cell crisis during pregnancy have a 25% mortality rate. *Zbaraz* v. *Quern*, 469 F.Supp. at 1220. But this is true if and *only* if the woman does not receive treatment for her malady—a fact not considered by the district court. Both state and federal medicaid plans provide for such treatment.

Several medical articles indicate that hypertension in a pregnant patient is treatable without significant increase

[18] Fiakpui and Moran, *Pregnancy in the Sickle Hemoglobinopathies*, 11 JOURNAL OF REPRODUCTIVE MEDICINE 28 (1973).

[19] Morrison and Wiser, *The Use of Prophylactic Partial Exchange Transfusion in Pregnancies Associated with Sickle Cell Hemoglobinopathies*, 48 OBSTETRICS AND GYNECOLOGY 516 (1976).

in risk to the woman who carries her pregnancy to term. Hypertension can be controlled in many instances by a change of lifestyle from that which the patient with hypertension follows to a sedentary one.[20] Control of the pregnant woman's diet is effective in many patients.[21] Certain drugs are effective in the treatment of hypertension such as thiazides, methyldopa (Aldomet) or Hydralazine (Apresoline). Medical literature does not support abortion as a means of treating a pregnant patient for hypertension.

Treatment for mild pre-eclampsia is bedrest in the patient's home with frequent visits to the treating physician.[22] Hospitalization may be indicated if improvement does not follow immediately.[23] At least four medical studies indicate that, with proper treatment, all pre-clampsia patients may bring their pregnancies to term and the maternal mortality rate should be zero.[24] Thus, abortion as a means of treatment for toxemia is not supported by the medical literature.

At least six effective medical treatments are available for patients with varicose veins.[25] Even for the pregnant patient varicose veins are not considered a serious compli-

[20] D. Ian, PRACTICAL OBSTETRICAL PROBLEMS (1st ed. 1979); Gant, *et al., Clinical Management of Pregnancy-Induced Hypertension*, 21 CLINICAL OBSTETRICS AND GYNECOLOGY 397 (1978).

[21] L. Townsend, HIGH BLOOD PRESSURE AND PREGNANCY (1st ed. 1959).

[22] THE MERCK MANUAL 953 (13th ed. R. Berkow 1977).

[23] *Id.*

[24] Gant, *et al., supra* at n. 3; Zuspan, *Problems Encountered in the Treatment of Pregnancy Induced Hypertension*, 131 AM. J. OBSTET. GYNECOL 591 (1978); Freund, *et al., Hemodynamic and Metabolic Studies of a Case of Toxemia of Pregnancy*, 127 AM. J. OBSTET. GYNECOL. 206 (1977); Pritchard and Pritchard, *Standardized Treatment of 154 Consecutive Cases of Eclampsia*, 123 AM. J. OBSTET. GYNECOL. 543 (1975).

[25] Tunick, *An Internist Looks at Varicose Veins*, 11 CONTEMPORARY SURGERY 112 (1977).

cation.[26] The medical literature indicates that varicose veins are not an indication for abortion.[27]

The literature indicates that in the past ten years "Important advances have been made in caring for the pregnant woman with diabetes mellitus . . . (and) [m]aternal mortality has been all but eliminated and maternal morbidity has been reduced significantly."[28] The literature indicates that physicians treating women with diabetes can bring their patients to term by keeping the disease itself under control. Proper attention to insulin, diet, physical activity, and stress are effective means of controlling diabetes.[29] Class A diabetes (the least serious form of the disease) can usually be managed by diet alone.[30] Medical literature does not support abortion as a treatment for the pregnant diabetic.

Abortion has no place in the treatment of the mentally ill or, for that matter, in the prevention of mental illness.[31] Psychiatric indications for abortion such as threats of suicide, are not supported by the medical literature which indicates, to the contrary, that pregnancy may act as a preventative against suicide.[32, 33] "Certain basic operational

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[26] Cranley, *Managing Varicose Veins in Pregnancy*, 7 CONTEMPORARY OB/GYN 143 (1976).

[27] *Ibid.*

[28] Gabbe, *New Ideas on Managing the Pregnant Diabetic Patient*, 13 CONTEMPORARY OB/GYN 109 (1979).

[29] *Ibid.*

[30] *Id.* at 110.

[31] PSYCHOLOGICAL ASPECTS OF ABORTION (*ed.* Mall & Watts, University Pub. 1979); Sim, *Abortion and the Psychiatrist*, 2 BRIT. MED. J. 145-148 (1963).

[32] *Ibid.*

[33] Barno, *Criminal Abortion Deaths, Illegitimate Pregnancy Deaths, and Suicides in Pregnancy*, 98 AM. J. OBSTET. GYNECOL. 356 (1967).

concepts proved to be wrong, such as the notion that impending psychoses or serious threats of psychotic decompensation and serious risks of suicide were indications for abortion."[34] The Court should note that post-abortion psychoses can and do occur.[35]

In view of the weight of the available medical literature, the most that can be said regarding plaintiffs' affiants' statements that abortion is "medically indicated" because of one of the above mentioned diseases, is that plaintiffs' affiants would *prefer* to abort the patient or that the patient would *prefer* abortion rather than bringing the child to term.

Further, plaintiffs' affiants' claims, accepted by the district court, that morbidity and mortality will be increased is not borne out statistically. Intervening defendants submitted to the district court the Department of Health, Education, and Welfare, Center for Disease Control, 28 *Morbidity and Mortality Weekly Reports* 4 (Feb. 2, 1979), in which was reported the results of a study by the Department on the impact of the Hyde Amendment on abortion-related medical complications (A. 138). This study indicated that there was no increase in morbidity and mortality as a result of the restriction of federal funding of abortion (A. 141). The affidavits of the plaintiffs only serve to emphasize the necessity of legislative controls on reimbursement to physicians for abortions, if state and federal government desire to protect their legitimate interests at stake in abortion.

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[34] Babikian, *Abortion*, in Vol. 2, A COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1496-1500 (4th ed. 1978).

[35] Ekblad, *Induced Abortion on Psychiatric Grounds*, 99 ACTA PSYCHIAT. NEURAL. SCAND. 1 (1955).

Any increased morbidity or mortality which could arise would likely result from *physician* failure to employ alternative methods of care, or *patient* failure to follow proscribed alternative forms of care. Neither the Hyde Amendment nor P.A. 80-1091 are responsible for such conduct on the part of the patient or the physician. The district court thus erred in holding these state and federal funding restrictions cause increased maternal morbidity or mortality. No such increase has been detected and even if it exists, it would be the result of *private* not state action.

B. The Standard of "Medical Necessity" or "Medically Indicated" Urged by Plaintiffs Is Loose, Inaccurate and Misleading, Is Subject to Misunderstanding and Abuse within the Abortional Context, and Effectively Places Important State Interests in the Hands of a Physician Class Whose Interests and Loyalties Conflict with Those of the State

From a practical standpoint, a looser standard for reimbursement for abortion performance, such as "medical necessity" or "medically indicated", would result in public funding of elective abortion.

In *McRae* v. *Califano*, a case seeking the invalidation of the Hyde Amendment, one of the abortion-performing plaintiffs, Dr. Jane Hodgson, in response to a question concerning the percentage of abortions she would certify as "medically necessary," testified:

> In my medical judgment every pregnancy that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is not wanted. [sic]
>
> In good faith, I would recommend on a medical basis, you understand, that, and it would be 100%. . . . I think they are all medically necessary. . . . Occasionally we will advise these women to carry their pregnancy to term, but most of these are medically necessary be-

> cause I am considering the woman's physical, mental, emotional and social and welfare and family and environment and all that. . . . I am concerned with the quality of life not physical existence. . . .

Transcript, August 3, 1977, at 99-101, *McRae* v. *Califano*, No. 76-C-1804 (E.D.N.Y. filed Oct. 1, 1976).

Dr. Zbaraz, an abortion-performing physician testified in the case now before this Court that:

> A. If I understand the question, how many abortions would I have been able to do in 1977 on medically indigent to be reimbursed by medicaid, whose life was not severely threatened but I felt that the abortions were still medically indicated?
>
> Mr. Bennett: Yes, or medically necessary.
>
> A. The great majority.

Zbaraz Deposition at 32.

A recent book by the former Medical Director of the National Abortion Rights Action League, Dr. Bernard Nathanson, describes in some detail how, prior to the legalization of abortion, he and other physicians who advocated abortion deliberately employed "mental health" indications to circumvent the law by obtaining an abortion for virtually any woman who desired one. B. NATHANSON, ABORTING AMERICA 39-42, 47 (1979).

Since the *Maher* and *Beal* decisions, there is concrete evidence that physicians, who sincerely believe that abortions should be available to all poor women desiring them, have not hesitated to employ similar "stretching" tactics to secure abortion funding. Maryland statistics provide one indication of the way in which claims of "health needs" may be used to stretch the law. In fiscal year 1972, when abortion was illegal in Maryland except for reasons of maternal health, 9,050 abortions were reported as having been performed for health reasons. Preventative Medicine Division for the State of Maryland, *Induced Abortion Surveillance Report of the Department of Health and Mental Hygiene* (1972). After legalization, by calendar year 1976, the last year in which the state reported the

reasons given for abortions performed, 19,332 elective abortions were reported—but only 1,159 were reported as done for health reasons. *Induced Abortion Surveillance Report of the Department of Health and Mental Hygiene, for the State of Maryland, Preventive Medicine Administration, (Calendar Year 1976)*. During fiscal year 1976, when Medicaid funding was available for all abortions requested by Medicaid-eligible women, 4,327 elective abortions were certified for reimbursement, while only 454 were certified for health reasons. Deposition of John J. Kent, Jr., Asst. Sec. for Medical Care, Dept of Health and Mental Hygiene for the State of Maryland, Jan. 9, 1978, p. 48, in *Kindley* v. *Lee,* Equity No. 24,688 (Circuit Ct. for Anne Arundel County). In fiscal year 1979, after Maryland limited reimbursement to those abortions performed for health reasons, 5,564 were certified for reimbursement as necessary for health reasons. *Quarterly Report of Abortion Services Funded Through Maryland Medical Assistance Programs for Fiscal Year 1979.* Whether an abortion is considered to be required for "health reasons" frequently depends less on the actual health conditions of the woman than on the desire of the physician to be reimbursed by the government.

Nor are these isolated instances. Planned Parenthood, a major abortion provider, commenting on the Court decisions in *Beal, Maher,* and *Poelker,* wrote:

> Another unresolved issue is how the states and the federal government will define "medical necessity." The Court's own definition in *Doe* v. *Bolton*—which it quoted in the Medicaid decisions—is that "whether an abortion is 'necessary' is a professional judgment that . . . may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." This definition would appear to encompass all the factors currently involved in the decision making in regard to abortions.

Planned Parenthood Washington Memo. SUPREME COURT TO INDIGENT WOMEN: LET THEM EAT CAKE 2 (June 19, 1978).

When the Hyde Amendment was under debate in Congress, the Senate offered language that would have paid for abortions when "medically necessary." Abortion advocate Senator Packwood explained:

> When the issue first arose this year, I took the strong position that the Federal Government should provide funds for all medicaid abortions. When the Senate voted in disagreement with this position, I reluctantly supported the compromise which provides Federal funding only for those abortions deemed medically necessary. Since the Supreme Court defined medically necessary abortions very broadly in 1973, this language did not violate my beliefs on this issue too severely.

123 CONG. REC. S18589 (daily ed. Nov. 3, 1977).

When the "medically necessary" language came up for a vote in the House, Representative Daniel Flood, who chaired the House side of the Conference Committee, said:

> Experts agree that to permit payments for abortions "where medically necessary"—that phrase is as proposed by the Senate—would open the door to abortions for all sorts of reasons, especially those related to mental health. The Senate amendment would put in language that would in effect permit payment for abortions as a method of family planning or for emotional or social convenience, which is just what the House of Representatives and the American people want to stop.

123 CONG. REC. H10129-30 (daily ed. Sept. 27, 1977).

Conference Committee member Representative Silvio Conte elaborated:

> An abortion could be performed as a matter of convenience as long as a doctor authorized it as a medical necessity. Physicians have already indicated that their

interpretation of "medically necessary" means "an abortion that was requested by a woman." . . . Indications are that if this "medical necessity" loophole is allowed to stand, elective abortions will be performed under the guise of mental health. For example, when California liberalized its abortion law in 1968, 92 percent of the abortions done in the first year were for mental health reasons. In short, adopting this language would mean abortion upon demand.

The Senate exemptions are so numerous and broad as to leave the Government with the obligation to pay for virtually all abortions. When the Senate passed the language on June 29, 1977, Dr. Louis Hellman of the Population Reference Bureau estimated in the Washington Post that under the Senate language, 90 percent of those abortions now performed would still remain federally financed. In contrast, under the language supported by the House conferees, Dr. Hellman estimated that "only a few thousand—possibly 1,600 a year" would be financed by the Federal Government.

123 CONG. REC. H10130 (daily ed. Sept. 27, 1977).[36]

Defeating the "medically necessary" language, the House expressed concurrence with this interpretation, and of course the Congress eventually arrived at a compromise

[36] The Washington Post article referred to is: Rich, *Senate Measure Found to Permit Most Abortions,* Wash. Post, July 8, 1977, at 1. It read, in pertinent part:

> A leading population expert, Louis Hellman of the respected Population Reference Bureau, estimated yesterday that, under a Senate-passed restriction on federal financing of abortions, 90 per cent of those now performed could still be done.
>
> That is because of a number of exceptions written into the Senate legislation, and especially a very broad exception permitting any abortion "medically necessary," Hellman told a reporter. . . . (In California, officials said in a phone interview, physicians list 90 per cent of Medicaid abortions as "therapeutic.")

Hyde Amendment excluding the term "medically necessary."

Illinois criminal law now provides that no "abortion shall be performed except by a physician after he determines that, in his best clinical judgment, the abortion is necessary."[37] Upheld against motion for preliminary injunction, *Charles* v. *Carey,* No. 79 C 4541 (N.D. Ill. filed Nov. 16, 1979), *slip op.* at 14, *injunction pending appeal denied, Charles* v. *Carey,* No. 79-2399 (7th Cir. December 3, 1979). This provision is identical to one upheld by the Court in *Doe* v. *Bolton,* 410 U.S. 179, 191-92 (1973). Implicit in *Beal* and *Maher* is the proposition that there exists a class of abortions which a State may not constitutionally prohibit, but for which it has no constitutional or statutory obligation to fund. If a State could not legally restrict its abortion funding to grounds narrower than those listed in the *Bolton* construction of "clinical[ly] . . . necessary" ("medical judgment . . . exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient"), this class would be nonexistent, and the *Maher* decision would be meaningless. It follows, therefore, that if *Maher* is not to be effectively abrogated, the state's legitimate interest in fetal life must be held to justify the State's drawing a line which is narrower than all that might be encompassed by an inclusion of all abortions for which a "health" need is asserted.

[37] Amendment to the "Illinois Abortion Law of 1975," ILL. REV. STAT. ch. 38 §81-23 (1979):

> Sec. 3.1(A). Medical Judgment. No abortion shall be performed except by a physician after he determines that, in his best clinical judgment, the abortion is necessary. Any person who intentionally or knowingly performs an abortion contrary to the requirements of this paragraph (A) commits a Class 2 felony.

Although the district court which passed on the constitutional issue declared itself "encouraged by affidavits submitted by respected members of the medical profession that suggest that the percentage of abortions any physician would deem 'medically necessary' may be as low as one fifth of the representative cases in which a pregnant woman desires an abortion (*Zbaraz* v. *Quern*, 469 F.Supp. at 1221), it is noteworthy that Dr. Depp's affidavit also indicates that the percentage may be as high as 50% (A. 107). Furthermore, Dr. Depp concedes, "Some doctors, of course, have higher thresholds of intervention and some have lower ones. . . ." (A. 107). Dr . Hodgson, for one, has a very low threshold indeed.

The problem is not so much a matter of physician fraud, or even of bad faith. Rather, it is that, given the inherent flexibility of "health" as a standard, and the widely divergent views on what it may mean, highly motivated physicians, guided by what they may regard as the most humanitarian of considerations, may be disposed to interpret any health-related standard as broadly as possible. Unlike other medical procedures, abortion is the subject of immense national controversy. Passions are high; commitments run deep. In such circumstances, it is not unreasonable for a State to conclude that some, if not all, abortion performing physicians are likely to be very strong partisans of funding the abortions of indigent women, and thus likely to construe any funding guideline in such a way as to undercut the State's strong interest in fetal life to the maximum extent possible.

Were other important state interests not necessarily abrogated or ignored upon the performance of an abortion, perhaps it would not be unreasonable for the Congress and the State of Illinois General Assembly to defer simply to the physician's judgment and discretion. But the physician is the agent of the woman, not of the State, and can hardly be

expected to act on behalf of the state's interests, particularly when it is his economic interest to perform the abortion.

C. The Existence of Competing and Conflicting State Interests, Coupled With the Real Danger of Abuse, Justify a Standard More Demanding Than Medical Necessity for the Payment of Public Funds for Abortion

Several legitimate interests of state, some competing, are involved in the abortion decision. By selecting the standards for abortion reimbursement in the Hyde Amendment and P.A. 80-1091, the federal government and the State of Illinois[38] have attempted to maximize to the extent possible all of their interests at stake in abortion: the State's interest in the fetus is maximized by the more exacting standards in the Hyde Amendment and P.A. 80-1091; the State's interest in the health of its citizens is not significantly harmed by these standards since the alternative forms of treatment are made available; fiscal and demographic interests are furthered.

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[38] The following 38 states have, by legislative enactment or administrative order provided for abortion funding in accordance with, or on more restrictive terms than, the Hyde Amendment: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

The following three states by legislative enactment or administrative order are providing abortion funding similar to that available under the Hyde Amendment with additional provisions applicable to congential defects: California, Iowa, Maryland.

This information was gathered via personal phone calls to state welfare offices and other public service organizations.

VII.

THE ILLINOIS FUNDING LIMITATION IS CONSISTENT WITH FEDERAL STATUTORY LAW

> Title XIX of the Social Security Act, enacted in 1965, authorizes Federal grants to States for medical assistance to low income persons. . . . The program is jointly financed by the Federal and State governments and administered by States. Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures.

42 C.F.R. §430.0 (1978).

To resolve whether Illinois' refusal to fund abortions not necessary to save maternal life is consistent with Title XIX of the Social Security Act, this Court must resolve three issues: 1) what standard the Title establishes for state inclusion or exclusion of specific services; 2) what relevant factors or interests a State may validly take into account in applying that standard; 3) whether, in this instance, Illinois applied those interests in a manner which met or violated that standard.

A. The Standard for Determining the Validity of Service Limitations Is Whether They Are Reasonable and Consistent With the Objectives of the Title

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975).

> A state plan for medical assistance must . . . include reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Title].

42 U.S.C. §1396a(a)(17) (1976).

In *Beal* v. *Doe,* 432 U.S. 438, 444 (1977), this Court held, "This language confers broad discretion on the states to

adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives of the Act.'"

42 U.S.C. §1396a(a)(13)(B) (1976) establishes the categories of care and services to be provided by the state plan through an incorporating reference to 42 U.S.C. §1396d(a) (1976) (emphasis added):

> (a) The term "medical assistance" means payment of *part* or all of the cost of the following care and services . . . for individuals . . . whose income and resources are insufficient to meet all of such cost—
>
> (1) inpatient hospital services . . .;
>
> (2) outpatient hospital services;
>
> (3) other laboratory and x-ray services;
>
> (4) (A) skilled nursing facility services . . .
>
> (B) . . . early and periodic screening and diagnosis . . .; and
>
> (C) family planning services . . . ;
>
> (5) physicians' services . . .

As this Court held, "[N]othing in the statute suggests that participating states are required to fund every medical procedure that falls within the delineated categories of medical care." *Beal* v. *Doe,* 432 U.S. 438, 444 (1977).

The Health, Education, and Welfare (HEW) regulation implementing §1396(a)(13)(B) (1976) is 42 C.F.R. §440.230 [43 Fed. Reg. 57253 (Dec. 7, 1978)]:

> (a) The [state] plan must specify the amount and duration of each service that it provides.
>
> (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
>
> (c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a

required service under §440.210 and §440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.[39]

(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

With regard to 42 C.F.R. §440.230 (c)(i):

First, the regulation precludes denial or reduction in the scope of a service only when the limitation is made "arbitrarily." If the limitation is made on the basis of legitimate state interests, it is not prohibited.

Second, the constraint on state limitation of the scope of a service applies only to distinctions made "solely because of the diagnosis, type of illness, or condition." 42 C.F.R. §440.130(a) (1978) defines "diagnostic services" as "medical procedures . . . to identify the existence, nature, or extent of illness, injury, or other health deviation. . . ." A "diagnosis," therefore, identifies the health problem. It does *not* define the manner of treatment. If there are alternative treatment methods available for the same health problem, nothing in this regulation precludes a State from choosing to fund one alternative treatment method but not another when it makes this choice on the basis of a rational application of legitimate state interests.

With regard to 42 C.F.R. §440.230(c)(2):

First, by explicitly recognizing the right of States to limit a service on the basis of criteria relating to "medical necessity," the regulation authorizes the State to make judgments based on the degree of medical necessity for any

[39] §440.210 refers to the categories established in 42 U.S.C. §1396a(a)(13)(B) and §1396d(a). §440.20 refers to the slightly different categories of services which 42 U.S.C. §1396(a)(13)(c) establishes for the "medically needy."

given procedure. The State is not constrained to act as a blind cashier for physicians empowered to exercise unqualified discretion to determine for what service they will be paid. Rather, the State may make its own independent analysis and embody its conclusions in its state plan.

Second, in establishing that the State "may place appropriate limits on a service," the regulation says that these may be based on criteria "such . . . as" medical necessity and utilization control procedures, without excluding other criteria of which these are only examples. As the federal district court of Utah noted in upholding an abortion limitation similar to that of Illinois, "[T]he regulating provision indicates that the 'medical necessity' criterion is merely illustrative of the types of criteria that may be employed to limit services, and nothing in the provision suggests a more restrictive criterion is prohibited." *D— R—* v. *Mitchell,* 456 F.Supp. 609, 625 (D. Utah 1978).

The opinion of the Circuit Court below devotes a scant two paragraphs to analysis of whether the Illinois limitation is in accord with the Medicaid Act. *Zbaraz* v. *Quern,* 596 F.2d 196, 198-99 (7th Cir. 1979). These paragraphs explicitly incorporate the reasoning of the First Circuit in *Preterm* v. *Dukakis,* 591 F.2d 121 (1st Cir. 1979).[40] The *Pre-*

[40] The Circuit Court below did diverge from the *Preterm* court in one conclusion. It said that Title XIX's "objectives include furnishing medical assistance 'to meet the costs of necessary medical services.' 42 U.S.C. §1396." *Zbaraz,* 596 F.2d at 198. But in rejecting Plaintiffs' claims that the Title requires States to provide all 'medically necessary" services (a conclusion with which the *Zbaraz* court concurred), the First Circuit pointed out that these words, drawn from the Preamble, deal with eligibility for, rather than the extent of, benefits: determining *who* should receive assistance rather than *what* they should receive. "This section merely specifies for whose benefit federal funds are to be appropriated—those 'individuals, whose income and resources are insufficient to meet the costs of necessary medical services.' . . . *See also* 42 U.S.C. §1396a(a)(10)

(footnote continued)

term reasoning is in accord with the above analysis as it relates to the statutory provisions. However, the *Preterm* court went on to consider an *uncorrected* version of HEW implementing regulation 42 C.F.R. §440.230. As part of a general recodification of federal regulations "in clearer, simpler language," HEW issued a revised regulation, 43 Fed. Reg. 45176, 45228 (September 29, 1978) in the form relied by the First Circuit Court. *Preterm* v. *Dukakis,* 591 F.2d 121, 126 (1st Cir. 1979). Subsequently, HEW issued a "correction" reinserting the words "arbitrarily" in §440.230(c)(1), and "such criteria as" in §440.230(c)(2), 43 Fed. Reg. 57253 (Dec. 7, 1978), resulting in the version of the regulation printed in this Brief. In doing so HEW noted, "[T]hese omissions have been construed as a policy change restricting a State's authority to decide what medical assistance will be covered under the State Medicaid plan." It said the purpose of reinserting the omitted words was "to avoid further misunderstandings." 43 Fed. Reg. 57253 (Dec. 7, 1978). Interpreting the implementing federal regulations of the Medicaid Title to require the States to fund "medically necessary" abortions is precisely the sort of "misunderstanding" to which the administrators of the Title referred.

(footnote continued)
(C)." 591 F.2d at 194. Accord, *Roe* v. *Norton,* 522 F.2d 928, 933 (2d Cir. 1975); *Coe* v. *Hooker,* 406 F.Supp. 1072, 1081 (D.N.H. 1976). Indeed, this interpretation is implicit in *Beal* where this Court emphasized that individual States could, if they chose, include elective abortions in their state Medicaid plans (*Beal,* 432 U.S. at 447). If the Title had specified that its purpose was to pay for "medically necessary services," then those abortions which are "medically *un*necessary" (*id.* at n. 11) could not be reimbursable under Title XIX. Compare *ibid* with *Roe* v. *Norton,* 522 F.2d 928, 939 (2nd Cir. 1975) (Muligan, J., dissenting).

B. In Weighing the Standards for What Abortions It Will Fund, A State May Take Into Account Its Interest in Maternal Health, Its Interest in Fetal Life, and Its Fiscal and Demographic Concerns

1. The State Has a Valid Interest in Maternal Health.

In administering a program providing medical assistance, there is no question that one of the state's valid interests is the health of the recipients—in this case, maternal health.

2. The State Has a Valid Interest in Fetal Life.

In *Beal* v. *Doe,* 432 U.S. 438 (1977), this Court held:

> [T]he State has a valid and important interest in encouraging childbirth. We expressly recognized in *Roe* the "important and legitimate interest [of the State] . . . in protecting the potentiality of human life." [410 U.S. at 162.] . . . [I]t is a significant state interest existing throughout the course of the woman's pregnancy. Respondents point to nothing in either the language or the legislative history of Title XIX that suggests that it is unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth.

Id. at 445-46.

There can be no logical distinction by which it may be held that an interest which a State may properly take into account in setting standards which exclude reimbursement for elective abortions ceases to be a valid interest when the State is judging how to cope with abortions for which some medical reason is asserted. The life of a fetus is just as much at stake when an abortion is performed for health reasons as when it is performed for convenience. If there is a significant state interest in the life of the fetus in one case, it is equally present in the other. If it is an interest

which the State can validly consider in the context of the Medicaid Title in one case, it is an equally valid consideration in the other.

3. The State May Validly Consider Interests Which Are Fiscal or Demographic.

In *Dandridge* v. *Williams,* 397 U.S. 471 (1970), this Court, interpreting the statute regulating Aid to Families With Dependent Children (AFDC), held that the presence of the words "as far as practicable under the conditions in such State" in the first section of 42 U.S.C. §601 (1976), describing the purpose of the Act, meant that Congress, "cognizant of the limitations on State resources," intended to give "each State great latitude in dispensing its available funds." The first section of the Medicaid Act, describing its purpose, uses identical words. 42 U.S.C. §1396 (1976). It follows that in setting standards for the extent of benefits under Medicaid, a State may take into account its valid interest in conserving its limited fiscal resources.

In *Maher* v. *Roe,* 432 U.S. 464 (1977) this Court held, "[A] State may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth." *Id.* at 478, n.11. As with the interest of the State in fetal life, there is nothing in the Medicaid Title which would preclude a State from taking this demographic interest into account in setting standards under it.

These interests formed a basis for the Illinois restriction on Medicaid abortion. *See* this Brief at 49-50.

C. Given the Available Evidence Concerning the Relative Impact of Differing Standards on Its Interests in Maternal Health and Fetal Life, Illinois Struck a Reasonable Balance

1. The Availability of Alternative Treatments Alleviates the Need for Abortions for Maternal Health.

Plaintiff's affiant indicates, there are a few instances in which abortions are necessary to prevent maternal death. Depp Affidavit I, para. 8 (A. 31). The Illinois plan would reimburse physicians for abortions performed under such circumstances.

Where some health problem exists during pregnancy, there are alternative methods of treatment available which would be funded under the Illinois plan. *See* this Brief at 70-76.

In view of this, it is entirely reasonable for Illinois to temper its concern over the risks to maternal health from a restriction on the use of tax funds for abortions not necessary to preserve maternal life with the knowledge that alternative forms of treatment exist, and need only the cooperation of the mother to be effective.

2. A Looser Standard Would, In Effect, Result in Funding Elective Abortions.

The distinction between "medically necessary" and "elective" abortion, if it exists at all, is so elusive that the particular state's interests at stake in abortion cannot be adequately protected under a "medical necessity" standard. *See* this Brief at 76-81. For this reason alone, it is reasonable for the State to restrict abortion reimbursement under a more stringent standard.

3. The Illinois Limitation Is Reasonable and Consistent With the Objectives of the Act.

The Illinois legislature was faced with three categories of cases in which abortions might be claimed to be needed for the sake of maternal health.

I. First, there are those abortions necessary to preserve the life of the mother.

II. Second, there are the class of abortions to which plaintiffs overtly make reference: cases in which a variety of pregnancy complications develop and, despite the availability of other means of treatment, the attending physician fears that, because the woman desires an abortion, she will not cooperate with these other means of treatment.

III. Third, there are the class of situations under the *Bolton* definition of "clinical necessity" in which the physician considers that the woman's "emotional well-being" might be impaired by an unwanted child. Dr. Hodgson's understanding of the term "medical necessity" provides the archetype of this class. *See* this Brief at 76.

In drawing standards for which of these abortions it would fund, Illinois had to weigh its separate, and to some extent conflicting, interests in maternal health and fetal life. Even though there is the danger that abortion-providing physicians may stretch this standard as any other to include as many abortions as possible, Illinois chose to fund abortions in Category I on the basis that, although they are rare, cases do exist in which failure to perform an abortion might genuinely threaten the mother's life. In this category, therefore, despite the risk of abuse, Illinois placed its interest in maternal life and health above its interest in fetal life.

With regard to Category III, Illinois clearly regarded its interest in fetal life as paramount, given the rather attenuated nature of the threat to maternal health.

Category II might be regarded as the gray area. But since these existed no enforceable way to fund Category II abortions without opening the door to a vast number of Category III abortions, and in view of the fact that its interest in maternal health is mitigated by the availability of alternative forms of treatment, Illinois chose to exclude this class from medicaid funding as well.

It was rational to assume that such a funding limitation would in fact advance the state's interest in fetal life and encouraging childbirth: in New Jersey, during the period of time in which a similar limitation was in effect, the number of births to Medicaid-eligible women rose by 30%. *Right to Choose* v. *Byrne,* 398 A.2d 20 587, 594 (N.J. Super. 1979).

Under Title XIX, the sole question before this Court is whether the Illinois decision is "reasonable" and "consistent with the objectives of the Act." Surely, as the analysis presented here demonstrates, this decision cannot be said to be so irrational as to be "unreasonable."[41]

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[41] Nor can the Illinois limitation be said to be inconsistent with the Act's objectives. The Preamble to the Medicaid Title, 42 U.S.C. §1396 (1976), states its "purpose" to be "enabling each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance . . . and . . . rehabilitation. . . ." "The word 'practicable' does not necessarily mean 'possible of execution.' An act is practicable if conditions or circumstances permit its performance. It is practicable if under all the circumstances it is feasible, if it can be done lawfully with reasonable convenience." *Wilcox* v. *Supreme Council of Royal Arcanum,* 123 N.Y.S. 83, 86 (1911). Thus, what services it will provide is up to the State's "reasonable convenience." The word "practical" is a synonym of "practicable" and one of its meanings, given in *Webster's Third New International Dictionary* (Chicago: J.J. Merriam, 1972) is "concerned with voluntary action and ethical decision." In the view of Illinois, conditions and circumstances do not permit the State to fund abortions not necessary to preserve maternal life, partly because among those circumstances are the ethical issues which induce Illinois' voluntary action to avoid funding feticide.

D. The Application Of Standard Extrinsic Canons Of Statutory Construction Reinforces The Validity Of The Illinois Abortion Funding Limitation.

1. Contemporaneous Circumstances Sustain the Validity of the Illinois Limitation.

In *Beal* v. *Doe,* 432 U.S. 438 (1977) this Court noted that its interpretation was "reinforced by two . . . relevant considerations." One was that "when Congress passed Title XIX in 1965, nontherapeutic abortions were unlawful in most states," and concluded, "In view of the then-prevailing state law, the contention that Congress intended to *require*—rather than permit—participating States to fund nontherapeutic abortions requires far more convincing proof than respondents have offered." *Beal* v. *Doe,* 432 U.S. 438, 447 (1977).

Indeed, Title XIX, like all statutes, must "be construed with reference to the circumstances existing at the time of the passage" *United States* v. *Wise,* 370 U.S. 405, 411 (1962). When Title XIX became law in 1965, 46 of the 50 states, including Illinois, permitted only those abortions necessary to preserve maternal life. George, *Current Abortion Laws: Proposal and Movements for Reform,* 17 WEST. RESERVE L. REV. 371, 375-379 nn. 21-24, 31, 43, 44, 45 (1965). By the same reasoning as that in *Beal,* it is clear that Congress could not have intended, at the time of passage, to force the States to fund abortions beyond the extent that they were necessary to preserve maternal life. Otherwise, one must impute to Congress when it enacted the Medicaid Title an intent to require the several States to fund procedures which violated their own criminal laws.

2. The Administrative Practice of HEW Supports State Power to Limit "Health" Abortion Funding.

The other "reinforcing consideration" cited in *Beal* v. *Doe,* 432 U.S. 438, 447 (1977), was that HEW, "the agency

charged with the administration of this complicated statute," approved state plans in a manner consistent with "the position that Title XIX allows—but does not mandate—"the abortion funding at stake in *Beal* v. *Doe,* 432 U.S. at 447. "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co.* v. *F.C.C.,* 395 U.S. 367, 381 (1969). HEW has consistently approved state plans which in substance limit payment for medicaid abortion services to life-threatening situations.[42]

3. The Interpretive Value of Appropriations Acts Supports the State's Power to Limit "Health" Abortion Funding.

Both of the Circuit Courts of Appeals which have passed on the statutory issue undertook an extensive review of the legislative history of the Hyde Amendments. These reviews convinced them Congress expected that, although the States would have the power to fund abortions beyond the limit of the Hyde Amendment, most States would be induced, by the unavailability of matching Federal money, to refrain from doing so—thus assuming that the States would have the statutory authority to refrain from such funding.

Because they had earlier construed the Medicaid Title to preclude the States from exercising such an option, the Seventh and First Circuits concluded that the Hyde Amendment constituted a "repeal by implication" creating this

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[42] *See* the approved plans for Kansas, Louisiana, New Mexico, North Carolina and Virginia; Affidavits filed as Exhibits with Brief on Behalf of William A. Lynch, M.D., *et al.,* Amici Curiae in *Preterm* v. *Dukakis,* No. 78-1324 (1st Cir., Brief filed October 1978), filed as Exhibits attached to the Intervening Defendants-Appellants Brief in the U.S. Court of Appeals, in *Zbaraz* v. *Quern,* 596 F.2d 196 (7th Cir. 1979).

option, though only with regard to funding of abortions not covered by the Hyde Amendment.

A more logical approach would have been to apply the canon of statutory construction which holds that "subsequent legislation declaring the intent of an earlier statute is entitled to significant weight."[43] This Court has used subsequent appropriations acts as guides to determine the intent of earlier authorizing legislation.[44]

In addition to the legislative history reviewed by the Circuit Courts, statements made during 1979 by legislators on both sides of the issue and in both House of Congress support a construction of Title XIX which allows the States to limit abortion funding as Illinois has done.

Speaking in favor of abortion funding immediately before a Senate vote in which his position prevailed, Senator Charles Percy said:

> If medicaid funding of abortion is approved, . . . it does not even require a State to fund such medical procedures. It simply gives a State the option to receive a partial subsidy of the costs, if it chooses, and only among those States do indigent women then have the choice.

125 Cong. Rec. S9,873 (daily ed. July 19, 1979).

Senator Jesse Helms made the same point:

> It is important to emphasize that we are determining the extent to which the Federal government will pay for abortions. This language does not, and is not

[43] *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381, 381 n.8; *FHA* v. *Darlington, Inc.*, 358 U.S. 84 (1958).

[44] *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947); *Brooks* v. *Dewar*, 313 U.S. 354, 361 (1941); *Isdrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 147 (1937).

> intended to restrict the power of the States. The States may still refuse to pay for abortions to the extent they deem appropriate.

125 Cong. Rec. S14,496 (daily ed. Oct. 12, 1979).

In the House, Representative Henry Hyde, the sponsor of the Hyde Amendment, was asked whether it was "the intention of the [Hyde Amendment] language to permit States to enact legislation consistent with their own wishes, whether more or less restrictive, to govern the funding of abortions?" To this he replied:

> Absolutely. It seems to me that the Federal legislative process ought to control the Federal purse strings, and the State funds ought to be controlled by the State legislatures.
>
> For the courts to say that . . . since in the preamble the words, "medically necessary," are found[,] . . . when abortions were a crime in most of the States of this country at the time that this basic statute was passed, somehow or other that mandates the States to fund abortions, even though we in the Federal government have said we will fund no abortions except to save the life of the mother is ridiculous.

125 Cong. Rec. H11,772 (daily ed. Dec. 11, 1979).

This Court has given special consideration to the remarks of the sponsor in construing legislative intent. *Galvan* v. *Press*, 347 U.S. 522, 526-27 (1954); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 277 (1947).

It never was the intent of Congress under either the Medicaid Title or the Hyde Amendment to force the States to fund abortions, whether they are deemed "medically necessary or not.[45] There is not a single shred of evidence

[45] Representative Donnelly even more forcefully expressed the distortion of congressional intent implicit in court decisions requiring states to fund abortions under the Medicaid Title:

(footnote continued)

in the long legislative histories of the Medicaid Title of the Hyde Amendment which supports the supposition that the Title was intended to include a mandate to the States to fund any abortion. For the Circuit Court to have read such a requirement into the Title, either by way of the Title's implementing federal regulations or by construing

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(footnote continued)

. . . The confusion in the courts is based upon the notion that the medicaid title of the Social Security Act somehow requires the States to fund abortions in the first place and that State refusal to fund abortions is somehow "unreasonable" under the Social Security Act and its regulations.

The fact is that Congress enacted the medicaid title into law in 1965 when practically every State made abortion a crime except to save the mother's life. Therefore, the medicaid title could not have been intended as a mandate to the States to fund "medically necessary" abortions, or any abortions. Any other conclusion would mean that the Congress intended to force the States to violate their own abortion laws, or change them if the States wished to receive Federal funds to enable them to provide care to their impoverished citizens. To impute such an intent to Congress is obviously nonsense. The Social Security Act does not require the States to use their funds for any type of abortion service. Yet, absurdly enough, there are courts in this Nation who are saying that this is in effect what the Congress actually intended when it enacted the medicaid title into law.

I think it is important to make it crystal clear that what we are dealing with now is the extent to which the Federal Government will pay for abortions. We do not intend to restrict the power of the States to refuse to pay for abortions to the extent they deem appropriate, any more than we intend to restrict their power to pay for abortions with their own funds to the extent that they may desire. *The States are absolutely free to fund or refuse to fund abortions as they see fit, as they always have been. Whether the States fund or refuse to fund abortions is not a matter dictated by the Social Security Act or its regulations and, until such time as the Social Security Act is*

(footnote continued)

the Hyde Amendment to represent a minimal standard which States must meet, is an error. Under the Medicaid Title, Illinois is free to fund abortions or to refuse to fund abortions to the extent it deems appropriate.

(footnote continued)

amended by Congress to require the States to fund abortions, the States are not required to do so.

The Congress has debated the extent to which Federal funds should be used for abortions for 4 years now. Many of the courts apparently believe that these heated and protracted debates represent nothing more than arguments on whether the costs of abortion should be borne by the Federal Government or shifted to the States. But anyone who has honestly read the record of these debates would know that we have understood our actions here would have some real effect. They would know that we have not regarded a Government-funded abortion to be in any sense an absolute right this body has ever conferred upon anyone. They would know that this body does not regard and has not regarded abortion to be like any other medical procedure and that we have not regarded it to be a benefit which ought to be financed by the Government except in the most extreme circumstances.

But some courts seem determined to convert our serious deliberations on this matter into a farce—full of sound and fury but signifying nothing—by requiring the States to pay for the very abortions for which we have refused Federal funds. In fact, the Congress has presumed all along that the States have the same authority that we have to decide the extent to which public funds should be used for abortions. This should have been self-evident from the history of our deliberations and of the medicaid title. However, because some courts and perhaps some administrators of the Social Security Act seem to be determined to override our will and the will of the legislatures of the States on this matter, I believe that this fact should now be plainly stated for the record once and for all.

125 Cong. Rec. H9885 (daily ed. Oct. 30, 1979) (emphasis added).

F. Conclusion: The Illinois Funding Restriction Does Not Violate Title XIX Of The Social Security Act.

The Illinois abortion funding restriction is both reasonable and consistent with the objectives of Title XIX. Indeed, Title XIX was never intended by Congress to require the States to fund abortion to an extent greater than Illinois has done. Therefore, the decision of the Circuit Court, mandating that Illinois fund abortions pursuant to Title XIX, whether on its own terms or as altered by the Hyde Amendment, must be reversed.

CONCLUSION

Intervening Defendants-Appellants pray this Court to reverse the decision of the District Court holding the Hyde Amendment and Illinois P.A. 80-1091 unconstitutional, and to reverse the decision of the Circuit Court holding that Title XIX of the Social Security Act requires the States to fund abortion to the extent of the Hyde Amendment or to the extent the physician deems necessary.

Respectfully submitted,

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